TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 103

DISTRICT OF COLUMBIA, PETITIONER,

vs.

ETHEL CLAWANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JUNE 8, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 103

DISTRICT OF COLUMBIA, PETITIONER,

vs.

ETHEL CLAWANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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1 In the Police Court of the District of Columbia

May Term, A. D. 1935

THE DISTRICT OF COLUMBIA, *ss:*

E. Barrett Prettyman, Esq., Corporation Counsel, by Edward M. Welliver, Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be informed, and complains that Ethel Clawans, late of the District of Columbia aforesaid, on the 24th day of March, in the year A. D. nineteen hundred and thirty-five, in the District of Columbia aforesaid, and divers other days and times between that date and the date of the filing of this information, did then and there engage in the business of dealer in second-hand personal property, to-wit, did then and there engage in the business of selling the return or other unused portions of railroad tickets, the same evidencing the right of the purchaser, holder, or possessor thereof, to be transported by railroad from one state or territory of the United States, or from the District of Columbia, to any other state or territory of the United States, or to the District of Columbia, wihout first having obtained a license so to do.

Contrary to and in violation of an Act of Congress in such case made and provided, and constituting a law of the District of Columbia.

E. BARRETT PRETTYMAN,
Corporation Counsel.

Personally appeared Earl L. Simonds and Walter H. Axline this 10th day of May, A. D. 1935, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received he believes to be true.

(Signed) E. M. WELLIVER,
Assistant Corporation Counsel in and for the District of Columbia.

Filed May 13, 1935. F. A. Sebring, Clerk of Police Court,
2 D. C.

Bond 500.00. W—HQ. Schuldt, Judge. No. 1085464. tion. District of Columbia vs. Ethel Clawans. Asst. C. C. Curran & Welliver. Violation act of Congress.

Witnesses: Earl R. Simmons, P. R. R.; Mrs. E. R. Simmons, P. R. R.; Chester Brazier, P. R. R.; Walter H. Axline, B. & O.; Samuel M. Leonberger, B. & O.

May 13, 1935.—P. N. G. Cont'd to 5/22/35, 10:30, P. J. H.—J. P. McM.

May 18, 1935.—Hearing on Motion set for 5/22/35.

May 22, 1935.—Motion for Bill of Particulars overruled. Exceptions noted. Motion to Vacate heard; Briefs to be filed. Cont'd to 5/29/35.

May 29, 1935.—Motion to Vacate Service overruled. Exceptions allowed. Cont'd to 6/6/35.

Defendant failed to appear for trial; unsworn statement by physician filed. Case set for trial 6/6/35. Atty. for Deft. notified in open

court that defendant must appear for trial on day set or furnish satisfactory evidence of her inability to appear.

June 6, 1935.—Atty. Simon H. Broder allowed by Court to withdraw as defendant's counsel, with the consent of the defendant. Atty. Davidson assigned by the Court. Defendant refused to accept service of the counsel assigned.

June 6, 1935.—Affidavit of prejudice filed. Motion overruled. Exceptions noted.

June 6, 1935.—Atty. T. E. O'Connell assigned by the Court to represent defendant. Defendant refused counsel's services. Atty. Allen assigned by the Court. Defendant refused the services of the counsel.

June 6, 1935.—Cont'd to 6/7/35. Request of defendant.

June 7, 1935.—Atty. Lillian Clawans entered appearance for motions only.

June 7, 1935.—Judgment guilty. Exceptions noted and notice given of intention of filing motion for a new trial. Cont'd to 6/13/35.

6/11/35.—Motion for new trial filed. Cont'd to 6/22/35.

6/12/35.—Affidavit of Sadie Frank filed. Affidavit of Arthur A. Cohen filed.

June 16, 1935.—Motion for Bill of Particulars, and Motion to Vacate Service filed. Set for hearing 5/18/35. I. R.

June 22, 1935.—Cont'd to 7/6/35, request of Defense. Atty. L. Clawans ill.

July 6, 1935.—Motion for new trial overruled.

July 6, 1935.—$300 or 60 days.

July 6, 1935.—Exceptions noted and notice given of intention of applying to the Court of Appeals for writ of error.

Bond, $500 or $500 cash. Cont'd to 7/12/35.

July 12, 1935.—Bill of Exceptions submitted.

July 24, 1935.—Cont'd to 8/5/35. 1st continuance. Bill of Exceptions to be signed.

8/5/35.—Request of Government for extension of ten days for signing of bill of exceptions granted. Cont'd to 8/15/35.

Aug. 16, 1935.—Bill of exceptions to be signed. 2nd continuance.

Oct. 21, 1935.—Bill of exceptions settled, signed, sealed, and filed.

3 In the Police Court of the District of Columbia

DISTRICT OF COLUMBIA

vs.

ETHEL CLAWANS

Motion for bill of particulars

Now comes Ethel Clawans, defendant in the above-entitled cause, by her attorney, appearing specially, and moves for a bill of particulars of the alleged violation of law, for the following reasons:

1. The times of the alleged offence are not set forth with sufficient particularity, being set forth as on and after March 24, 1935, and up to May 10, 1935.

2. The place of the alleged offence is not set forth with sufficient particularity, being set forth as at the District of Columbia.

3. The person or persons with whom the said defendant is alleged to have carried on the business, alleged to have been engaged in by the defendant, are not specified.

4. And for other reasons apparent on the fact of the record.

Therefore, defendant moves for a bill of particulars to enable her to offer proper defense, as due her under the law.

(Signed) SIMON H. BRODER,
Attorney for defendant.

Washington, D. C., May 15, 1935.

Copy served on the Corporation Counsel of the District of Columbia by registered mail May 15, 1935.

Motion to be set for hearing at 10 A. M. Saturday, May 18, 1935. 5/16/35.

(Signed) E. WELLIVER, *Asst. C. C.*

4 No. 1085464. In the Police Court of the District of Columbia. District of Columbia vs. Ethel Clawans. Motion for Bill of Particulars. Simon H. Broder, Attorney for defendant, Earle Bldg., Washington, D. C. Filed May 16, 1935. F. A. Sebring, Clerk of Police Court, D. C.

5 DISTRICT OF COLUMBIA

vs.

ETHEL CLAWANS

In the Police Court of the District of Columbia

DISTRICT OF COLUMBIA, *ss:*

Now comes Ethel Clawans, by her Attorney, Simon H. Broder, and moves that service of the warrant on her, in the case of District of Columbia vs. Ethel Clawans, be set aside and declared void, for the following reasons:

1. The offense of which the defendant, Ethel Clawans, is accused, to wit, engaging in the business of dealer in second hand personal property at the District of Columbia without first having obtained a license so to do, as set forth more fully in the Information on record in the above Court, is not treason, a felony, or a breach of the peace, being merely a misdemeanor.

2. Section 372 of Title 24 of the Code of the District of Columbia provides, inter alia, as follows: "No person or persons, upon the Lord's day, shall serve or execute any writ, process, warrant, order, judgment, or decree, shall be void to all intents and purposes what- the peace) but the service of every such writ, process, warrant, order, judgment or decree, shall be void to all intents and purposes whatsoever."

3. The warrant of arrest was served by Detective Sergeant W. J. Liverman on Sunday, May 12, 1935, which day of the week is otherwise known as the Lord's day, on Ethel Clawans, the defendant in the above-entitled case, as will appear from the warrant and the Information.

For the foregoing reasons, defendant prays that the said service of the warrant be set aside, vacated, and declared void and of no effect.

(Signed) SIMON H. BRODER,
Attorney for Defendant.

Washington, D. C., May 15, 1935.

Copy served on the Corporation Counsel of the District of Columbia by registered mail May 15, 1935.

Motion to be set for hearing at 10 A. M. Saturday, May 18, 1935.

Service acknowledged this 16th day of May, 1935.

(Signed) E. WELLIVER.

6 No. 1085464. In the Police Court of the District of Columbia. District of Columbia vs. Ethel Clawans. Motion to Vacate Service. Simon H. Broder, Attorney for Defendant, Earle Building, Washington, D. C. Filed May 16, 1935. F. A. Sebring, Clerk of Police Court, D. C.

7 MILTON M. LILIEN, *M. D.*,
Maple & Grumman Aves., Hillside, N. J., May 28, 1935.

To whom it may concern:

Miss Ethel Clawans is ill and confined to her bed. She has been under my care for some time suffering most severe backaches and hip pains.

In addition headaches are present which cause patient to stay entirely in bed.

D. W. LILIEN.

8 In the Police Court of the District of Columbia

No. 1085464

DISTRICT OF COLUMBIA

vs.

ETHEL CLAWANS, *defendant*

Affidavit of prejudice

DISTRICT OF COLUMBIA, *ss:*

ETHEL CLAWANS, being first duly sworn on oath according to law, deposes and says that she is the defendant in the above entitled cause, and that it is about to be placed for trial before Judge Gus A. Schuldt, of the Police Court. This affiant protests the trial of her case before him and asks that it be tried before some other Judge of the Police Court, for the reason that Judge Gus A. Schuldt is prejudiced against her. He has shown this prejudice on several occasions in the trial of a previous case before him in which she was a defendant in the month of December 1934, in which his conduct and attitude was openly hostile toward her, and he took no pains to hide his feelings. She was being charged with uttering words unchastity against one Thelma Blith, and finally, a new trial was granted her, which is still pending. The case already had previously resulted in a disagreement by another jury. In the same case he

permitted the District Attorney to secure numerous continuances over her objections, although she had out-of-town witnesses and out-of-town attorneys, to defend her in the trial of the case, and thereby caused her great expense and inconvenience. This attitude of his persisted in spite of a statement of an Assistant District Attorney, David L. Hart, who told the said Judge in open court, that in his opinion the affiant was not guilty of that particular charge. This affiant honestly feels that therefore she cannot get a fair trial in the present case before Judge Gus A. Schuldt.

(Signed) ETHEL CLAWANS.

Subscribed and sworn to before me this 6th day of June 1935.

(Signed) WM. A. NORGREN,
Chief Deputy Clerk.

9 No. 1085464. District of Columbia *vs.* Ethel Clawans, defendant. Affidavit of Prejudice. Proper person.
Filed June 6, 1935. F. A. Sebring Clerk of Police Court, D. C.

10 In the Police Court of the District of Columbia

No. 1085464

DISTRICT OF COLUMBIA

vs.

ETHEL CLAWANS

Motion for new trial

Now comes the above named defendant, Ethel Clawans, and moves the Court to grant her a new trial herein, upon the grounds, and for the reasons following:

1. The verdict of the Court is contrary to the evidence.
2. The verdict of the Court is contrary to the weight of the evidence.
3. The verdict is contrary to law.
4. There is no legal evidence to support the verdict of the Court.
5. The verdict of the Court is based upon improper evidence.
6. The rights of the defendant were prejudiced by the refusal of the Court to grant her motion for a continuance in order to enable her counsel to prepare himself for the trial.
7. The rights of the defendant were prejudiced by the refusal of the Court to grant her motion for a continuance on the ground of absence of witnesses.
8. The rights of the defendant were prejudiced by the refusal of the Court to grant her motion for a continuance on the ground her counsel was engaged in a matter before another Court.
9. The Court erred in not dismissing the warrant in this case as having been illegally executed in accordance with the Code of Laws of the District of Columbia, Section 372 of the Code.

11 10. The Court erred in not permitting the prosecuting witnesses to testify on cross examination as to where they obtained their description of Ethel Clawans, the defendant.

11. The Court erred in not permitting prosecuting witnesses to testify on cross examination as to whether they came to Washington, D. C. to identify Ethel Clawans as per-arrangement, yet the Court compelled defendant's witnesses to answer on cross examination by assistant corporation counsel as to whether they came to Washington, D. C. by pre-arrangement.

12. The Court erred in permitting Miss Cecilia Adams to answer in cross examination by assistant corporation counsel questions which were not testified on direct examination for the defendant, Ethel Clawans.

13. The Court erred in not granting defendant's motion for a directed verdict at the conclusion of the prosecution's case.

14. The Court erred in not granting defendant's motion for a directed verdict at the conclusion of the entire case.

15. The Court erred in not granting defendant's motion supported by an affidavit of prejudice to certify the above entitled case to another Judge.

16. A new trial should be granted to defendant upon the ground that she has new discovered evidence, as shown by affidavits hereto annexed, which she could not have discovered by the exercise of due diligence.

17. And for other errors apparent of record.

(Signed) ETHEL CLAWANS.

To the Corporation Counsel, District of Columbia, and Edward Welliver, Esq., Assistant Corporation Counsel, Office of the Corporation Counsel of the District of Columbia, Washington, D. C.

12 Please take notice that the foregoing and annexed motion for a New Trial will be for hearing in the Police Court of the District of Columbia Saturday, June 22nd, 1935 at ten o'clock A. M. or as soon thereafter as counsel can be heard.

(Signed) ETHEL CLAWANS.

Service accepted.

13 No. 1085464. In the Police Court of the District of Columbia. District of Columbia vs. Ethel Clawans. Ethel Clawans, In Pro. Per. 1060 Broad Street, Newark, N. J. Filed June 11, 1935. F. A. Sebring, Clerk of Police Court, D. C.

14 In the Police Court of the District of Columbia

No. 1085464

DISTRICT OF COLUMBIA
vs.
ETHEL CLAWANS

Affidavit

DISTRICT OF COLUMBIA, *ss:*

SADIE FRANK, of full age, being duly sworn according to law, deposes and says:

That she resides in the City of Washington, D. C., for a long period of time.

That on the 28th day of April 1935, at or about 3:30 P. M., she was at Union Station, Washington, D. C., and had occasion to see a

relative off for New York City and remained at said railroad station until train excursion left for New York City, while there she saw Lillian Clawans and made inquiries about Ethel Clawans, she was informed that Ethel Clawans was in the City of Newark, N. J., very ill. That she was talking continuously with Lillian Clawans who was with several people until she went through the gate and left on the excursion train for Newark, N. J.

Further she saw a short stockily built woman approach Lillian Clawans for tickets to New York City to which Miss Lillian Clawans directed her to the ticket window, that she saw this stockily built woman approach several people in the concourse for tickets to New York City.

(Signed) SADIE FRANK.

Subscribed and sworn before me this 12th day of June 1935.

(Signed) E. PERCIVAL WILSON,
Notary Public D. C.

My commission expires January 16, 1937.

15 Filed June 12, 1935. F. A. Sebring, Clerk of Police Court, D. C.

16 In the Police Court of the District of Columbia

No. 1085464

DISTRICT OF COLUMBIA
vs.
ETHEL CLAWANS

Affidavit

DISTRICT OF COLUMBIA, *ss:*

ARTHUR A. COHEN, of full age, being duly sworn according to law, upon his oath deposes and says: That he is a resident of City of Washington, D. C.

On the 28th day of April 1935 he was at Union Station, Washington, D. C., and he saw Lillian Clawans, whom he mistook for Ethel Clawans; while there he saw a short stout woman with glasses at or about 4:00 P. M. approach Miss Lillian Clawans for return excursion tickets to New York City, New York, to which Miss Lillian Clawans replied, why ask me for tickets when there is others you can get them and furthermore the ticket window will sell you all you want.

That this woman insisted in getting the tickets from Lillian Clawans and said Miss Lillian Clawans said, "Will you quit annoying me, otherwise I will have you reported to the police."

Further he saw this woman make purchase of tickets from others in the concourse of Union Station on that day.

(Signed) ARTHUR A. COHEN.

Subscribed and sworn to before me this 11th day of June 1935.

(Signed) I. ROBERTSON,
Deputy Clerk, Police Court, D. C.

17 Filed June 12, 1935. F. A. Sebring, Clerk of Police Court, D. C.

18 In the Police Court of the District of Columbia

No. 1085464

DISTRICT OF COLUMBIA

vs.

ETHEL CLAWANS

Bill of exceptions

Be it remembered that at the trial of this case before Judge Gus A. Schuldt, which began on June 6th, 1935 and thereafter was further proceeded with.

The defendant, Ethel Clawans, appeared specially and advised the Court that a Motion to Quash service was made, the Court instructed defendant to plead to the information, to which defendant took an exception to the Court's ruling overruling motion to quash. Defendant filed an affidavit of prejudice setting forth her grounds disqualifying Judge Gus A. Schuldt from sitting in the trial of this case, whereupon Judge Schuldt overruled same, to which defendant took an exception. Whereupon Judge Gus A. Schuldt ordered the witnesses to the witness room, defendant took an exception, the right to a hearing in open court.

The defendant pleaded not guilty to an information charging that on the 24th day of March, 1935, and on divers other dates, between that date and the date of the information she engaged in the business of an unlicensed second-hand dealer without first having obtained a license so to do.

The defendant demanded a jury trial, which Judge Schuldt denied, the defendant took an exception.

19 Thereupon, the District of Columbia, to maintain the issues upon its part joined, gave evidence by the witnesses hereinafter named, as follows:

AUTWINE C. BAXIER, a negro, being first duly sworn, testified in substance as follows:

He resides at 1724 Christian Street, Philadelphia, Penna., that he is employed with the Railway Inspecting Company, as an investigator, that on the 24th day of March 1935, in the presence of one Joseph Hector, who resides at 349 Halsey Street, Newark, N. J., he purchased a return ticket to New York City for $1.50 from defendant, that he made the purchase at 9:28 a. m. on the 24th day of March 1935.

The witness was asked in cross examination whether Joseph Hector was in court, the court instructed witness not to answer, to which the defendant took an exception. The witness was asked whether he wants the court to believe that defendant as white person approached him out of a clear sky and asked him to buy a return ticket to New York City when there were about three thousand people at Union Station as he testified in direct examination, to which the Judge instructed witness not to answer, to which defendant took an exception. Witness was asked whether he did not make a purchase from some

other person on that day; his answer was "Yes"; the Court instructed witness not to answer, but defendant advised the court, it was too late for the court to rule on that as the witness had already answered. Witness was asked whether he wants the Court to believe that defendant took the $1.50 out of his hands as he so testified in direct examination, the court instructed witness not to answer, to which the defendant took an exception. Witness was asked whether Ethel Clawans was at Union Station, or any where in Washington, D. C., he was to make a buy from her, to which the witness answered "Yes." Mr. Edward M. Curran, assistant corporation counsel, objected, but he raised his objection too late, as the witness had already answered. Defendant asked the witness, as a matter of fact you purchased the ticket from some one else, to which the witness replied "Yes."

Mrs. Evelyn R. Simmons, being duly sworn, testified in substance as follows:

She is employed by the Railway Inspection Company, in the capacity of an investigator, and has been in the employ of the Railway Inspection Co. since 1908. On the 7th day of April 1935 she and her husband approached the defendant and bought two tickets to New York City, N. Y.; that defendant told her she expected some friends to come off the excursion train and that she would let her have the tickets; witness paid $3.00. On the 28th day of April 1935 she approached the defendant at 2:55 P. M. for four tickets, but was only able to get one ticket, for which she paid $1.50. Witness said the transaction took place in the presence of her husband, Mr. Axline, and Leaburger. Witness came over to the defendant at 2:55 P. M., put her arms around the defendant so that defendant would not be suspicious, in order to get the ticket.

On cross-examination witness was asked whether she made a buy from anyone else, and she replied "Yes", to which Mr. Curran, assistant corporation counsel, objected, and to which the defendant advised the court witness had already answered, and that Mr. Curran was too late in raising his objection. Witness was asked whether Miss Ethel Clawans was there or not, she was going to make a purchase, to which she replied "Yes", and again assistant corporation counsel Curran was late in objecting. Witness was asked by the defendant who was present when she made the alleged purchase from the defendant, and she replied, her husband, but could not remember whether anyone else was present, in spite of the fact in her direct examination she testified her husband, Mr. Axline, and Mr. Leaburger were present. Witness was asked whether she came to Washington, D. C., by pre-arrangement, to which Judge Schuldt instructed witness not to answer, to which the defendant took an exception. Witness was asked what was the condition of the weather on the 28th day of April 1935, and she replied by informing the court it was raining very hard all day; but when she was told by the defendant the weather was clear she was unable to answer. Defendant asked the witness what time of the day did she reach Washington, D. C., on the 7th day of April and April 28th, 1935, the days the alleged purchases were made, the court instructed witness not to answer, to which defendant took an exception. Wit-

ness was asked to give the address of the Railway Inspection Co., which she informed the court she was not allowed to tell; the defendant insisted that witness be compelled to answer, to which witness refused to reveal, and defendant informed the court the witness was not responsive, to which the court advised the defendant witness had answered, to which the defendant took an exception.

EARL R. SIMMONS, being duly sworn, testified in substance as follows:

He is the husband of Mrs. Evelyn Simmons and is employed by the Railway Inspection Company since 1906. He was present when his wife made a purchase of return excursion tickets at Washington,
D. C., but did not see the money pass on the 7th day of April
21 1935, though he was with her at time of the alleged purchase.
Defendant told him if he waited until the excursion train arrived he could get a ticket to New York City; that she expected several friends off the train.On the 28th day of April 1935, he was unable to get four return tickets, although witness approached the defendant to secure same, but that his wife succeeded in getting one from the defendant.

On cross examination witness was asked whether the defendant wasn't pointed out to him, to which the Court instructed witness not to answer, to which the defendant took an exception. Witness was asked whether he came down to Washington, D. C., by pre-arrangement, to which the defendant took an exception. The witness was asked whether he came down to Washington, D. C., to make a purchase from Ethel Clawans, whether she was there or not, to which the witness nodded, when Mr. Curran, assistant corporation counsel, objected, to which the defendant advised the Court Mr. Curran was too late, the witness had answered by his nod. Witness was asked whether he made purchase from any one else, the Court instructed witness not to answer, to which the defendant took an exception. Witness stated that it was a clear day on the 28th day of April 1935. The Court instructed witness not to answer when asked what time of the day did he arrive in Washington, D. C., on the 7th day of April 1935, and 28th day of April 1935, to which defendant took an exception. Witness was asked who was present when the money was passed, to which he stated his wife, Mr. Leaburger, and Mr. Axline. Also was asked whether Mr. Leaburger and Mr. Axline were known to him, the court instructed witness not to answer, to which the defendant took an exception. Where his residence was, to which the court instructed witness not to answer, to which defendant took an exception. Witness was asked whether he knew the defendant is
about to file a suit against the Pennsylvania Railroad as a
23 result of an accident which occurred on the 4th day of November 1934, to which the Court instructed witness not to answer, to which defendant took an exception.

WALTER H. AXLINE, being duly sworn, testified in substance as follows: His occupation is Lt. Police for the Baltimore and Ohio Railroad and that on the 28th day of April 1935, he was present at Union Station, Washington, D. C., when a purchase was made by Mr. and Mrs. E. R. Simmons, but that he did not see the money pass, but

heard the defendant say she had only one ticket and let the cripple man have it. That he saw the defendant for the first time on that day at 3:48 P. M. and did not see her at any other time. On cross-examination the witness was asked whether the weather was clear on the 28th day of April 1935, to which he replied the weather was clear on the 28th day of April 1935. The witness was asked whether he made a purchase from any one else, to which the witness was instructed by the court not to answer, defendant took an exception. The witness was asked whether the defendant was pointed out to him, and his answer was that Mrs. Simmons had pointed the defendant out to him. Further the defendant asked the witness if he had any trouble in knowing the defendant as the defendant was representing herself in the trial of this case, witness was instructed not to answer, to which the defendant took an exception. Witness advised the defendant he must have four tickets, and not to disappoint them, witness was asked whether he saw the defendant before that date, Mr. Curran objected, to which the court instructed witness not to answer and sustained the corporation counsel's objection, to which the defendant took an exception. Witness has been in the employ of the Baltimore and Ohio Railroad in the capacity of railroad police for nineteen years. Witness was asked how he knew that the
24 defendant knew who the cripple man was as he testified in direct examination, that they were all standing at the time purchase was alleged to have been made, his answer was he did not know.

SAMUEL L. LEABURGER, being duly sworn, testified in substance as follows:

He is employed in the capacity of Lt. Police for the Baltimore and Ohio Railroad Company, and that on the 28th day of April, 1935, Mrs. Evelyn Simmons introduced him to the defendant and asked the defendant for a ticket to New York City, New York, to which the defendant informed him she did not have any tickets, but would phone some one to see if she could get any. He did not succeed in getting a ticket nor did he see any money pass for tickets. Witness was asked on cross-examination whether he knew the defendant was about to institute suit against the Pennsylvania Railroad for injuries she suffered on the 4th day of November, 1934, Court instructed witness not to answer, to which defendant took an exception. Witness was asked whether he knew the Claims Agent in Washington, D. C., had offered the defendant a settlement and that she advised claims agent the settlement would take place in court, the court instructed witness not to answer, to which defendant took an exception. The witness was asked whether he knew Mrs. and Mrs. E. R. Simmons before the meeting on the 28th day of April, 1935, and whether they came to Washington, D. C., by prearrangement, to which the court instructed witness not to answer, to which defendant took an exception.

Sergeant LIVERMAN, being duly sworn, testified in substance as follows:

He is employed with the Metropolitan Police Dept. in Washington, D. C., and that he made the arrest on the 12th day of May, 1935,

on Sunday at 6.30 A. M. in presence of several friends of the
25 defendant, while she was sitting with them on the front bench facing the Postal Telegraph Office with her luggage. That he arrested her on a warrant for being an unlicensed second-hand dealer. He was asked on cross-examination whether he was assigned to homicide cases and how did he happen to make the arrest of the defendant for the violation of second-hand dealer, when he was not assigned to such cases, he was unable to answer.

Mrs. FARRELL, being duly sworn, testified in substance as follows: She is a policewoman and employed by the metropolitan police department, that she was present when the arrest of the defendant was made on Sunday May 12th, 1935, at Union Station, Washington, D. C. On cross examination she was asked whether Mr. Liverman showed the defendant the warrant, to which she replied, she did not know. Further, she was asked, isn't true, as a matter of fact that Mr. Liverman, the arresting officer, did not show the defendant the warrant of arrest, to which the court instructed witness not to answer, to which defendant took an exception.

Following the testimony of Mrs. Farrett the government rested its case.

Thereupon, the defendant moved the court for a directed verdict on the ground that the District of Columbia witnesses were inconsistent in their testimony, the evidence was flimsy, and that the District of Columbia failed to make out a prima facie case, that the six purchases alleged to have made for a period of three months even if were true did not constitute an unlicensed second-hand dealer and that the arrest was illegal. The court overruled the motion, to which the defendant took an exception.

Edward Curral, assistant corporation counsel made a motion
26 that all District of Columbia's witnesses be excused from further attendance in the trial of this case, to which the defendant objected, and the court overruled defendant's objection, to which the defendant took an exception. Judge Schuldt ordered that the defendant return and proceed with the trial at 10.00 A. M. on the 7th day of June, 1935.

Whereupon, Judge Schuldt after the completion of the morning business with the trial about 11:45 A. M. on the 7th day of June 1935 ordered the witness to the witness *to the witness* room.

Thereupon to maintain the issues on her part joined, defendant produced the following witnesses.

SAMUEL CLAWANS, being duly sworn, testified in substance as follows:

The defendant, had been ill since February 1935 and confined to her home until the early part of May 1935. The defendant was in receipt of a letter from a patient in Washington, D. C., pleading with her to come and get him out of said hospital, that defendant left to take said patient out of hospital for his home in Bloomfield, N. J. The defendant had not left her home in Newark, N. J., since the early part of May 1935. On cross examination the witness was asked by the assistant corporation counsel whether witness was positive the defendant had not left her home from February 1935 to the early part of May 1935, to which witness replied he was cer-

tain, that he resided at the same residence of the defendant and saw her several times a day during that period, it was a physical impossibility for her to be in Washington, D. C., during the months of February, March, April, and the early part of May 1935, as she was critically ill and under the care of a doctor.

Miss CECELIA ADAMS being duly sworn, testified in substance as follows:

She has known the defendant about three years, she is employed in the capacity of a cashier and clerk for Lanzner
27 Shoppe, in Newark, N. J. On the 24th day of March 1935, she was at the home of Miss Lillian Clawans, and at the request of Miss Lillian Clawans, while there she saw Ethel Clawans very ill and confined to her bed. Witness testified she was at the home of the defendant on the 28th day of March 1935, April 1st, 7th, and the 14th day of April 1935, she knows that those days were the days because they fell out on Sunday with the exception of the 28th day of March and the 1st day of April 1935, as the 28th day of March 1935 was Miss Ethel Clawans birthday and she bought her a twenty five cent bouquet of flowers. That she resides in New Jersey. On cross examination witness testified that this was her first appearance in a court room, that she came to Washington, D. C., today being told she was coming to Washington, D. C., to secure a position with the government, that she did not know she was going to testify and she remembered the 24th day of March 1935 very clearly, because that was the day Miss Lillian Clawans left for Miami Beach, Florida, to be with her very sick mother, who already was in Miami Beach, Florida, that the defendant was sick and attended by a nurse.

ANDREW GALLA, being duly sworn, testified in substance as follows:

He resides in the City of Newark, N. J., and has lived there for some time. He is a plumbing contractor. Witness knows the defendant slightly, but knows Miss Lillian Clawans better. That on the 7th day of April 1935 he did some plumbing work at the residence of the defendant and saw her ill in bed. On cross examination he was asked whether he did not commence work on some other day, to which witness replied he started work on Saturday afternoon, and it was on the 6th day of April 1935 that he rushed
28 to get the supplies on Saturday afternoon and completed the work on the 7th day of April 1935. That the invoice for the supplies is now in his possession. That he saw the defendant at her home on the 7th day of April 1935, which was on a Sunday as he does not ordinarily work on Sunday.

JOSEPH CROWLEY, being duly sworn, testified in substance as follows:

He resides in Hillside, New Jersey, and has known the defendant for a great number of years. That he did not know what he was going to Washington, D. C., and he did not know until a few moments ago he was to appear in court this morning. On cross-examination witness testified the defendant resided in the City of Newark, N. J., and that he had a quarrel with the defendant eight months ago. That he came to Washington, D. C., today in auto.

LILLIAN CLAWANS, being duly sworn, testified in substance as follows:

On the 24th day of March 1935 witness left for Miami Beach, Florida, on the 5.47 P. M. train from Newark, N. J., to be with her sick mother who was in Miami Beach, Florida, and that she remained away until the 14th day of April 1935. Witness testified that she is a teacher, accountant, and counsellor-at-law, a member of the Court of Appeals of the District of Columbia, and has been admitted to the United States Supreme Court. That she arrived at Miami Beach, Florida, on the 26th day of March 1935 and registered at the Hotel Liddo. That on the 28th day of April 1935 a stockily built woman approached her and put her arms about her neck and asked her for four tickets to New York City, New York, to which the witness replied right over there is the ticket window, you can get all the tickets you want, what is the big idea of
29 approaching me for tickets and that she saw this woman approach several people at Union Station and that occurred about 4.00 P. M. just as she was about to board a train for Newark, N. J. That on the 28th day of April 1935 she came to Washington, D. C., to see a member of the bar of the District of Columbia, who gave her a worthless check and came down for the one day only. On cross examination witness was asked whether she had employed the services of Miss C. Adams and what amount was she paid for her services, to which the defendant objected, as it was immaterial and irrelevant, the court instructed the witness to answer, to which the defendant took an exception. Witness further testified on the 28th day of April 1935, a Mr. Murphy, of the Baltimore and Ohio Police, pointed her out. On cross examination witness was asked by Mr. Curran, assistant corporation whether the witness in the defendant's case did not come down to Washington, D. C., to testify by pre-arrangement, to which the defendant objected and the court overruled the objection and instructed the witness to answer, to which the defendant took an exception, the witness replied of course not.

MADELINE MUELLER, being duly sworn, testified in substance as follows:

She resides in the City of Washington, D. C., and has lived in Washington, D. C., for more than twenty years. Witness knows the defendant for seventeen years. She is a buyer and operates several millinery shops in Washington, D. C. That she knows from her own personal knowledge that the defendant was not in the City of Washington, D. C., on the 28th day of April 1935 and has not been in the City of Washington, D. C., since 2nd day of February 1935 until the 12th day of May 1935, when she came to the women's bureau to get the defendant out. That she knows the defendant was very ill in the City of Newark, N. J., from February to
30 early part of May 1935. That she saw the defendant at the women's bureau at or about 8.00 A. M. on the 12th day of May 1935, and on said date she was at detective headquarters and overheard the detective headquarters men thrilled that they had arrested the defendant and they were making a joke out of it. Witness testified she was in Court on the morning of June 6th, 1935, and saw a man whom she later learned was Mr. Murphy, of the

Baltimore and Ohio Railroad, point the defendant out to several of the District of Columbia's witnesses before the trial commenced. That witness overheard how these witnesses were going to railroad the defendant, to which Mr. Curran objected and the court sustained the objection, to which the defendant took an exception in spite of the fact that defendant advised the court that Mr. Curran was late in objecting that witness had already answered, and the court instructed not to tell any more what occurred in the court room on the morning of the 6th of June 1935. Witness testified that at headquarters she informed the lieutenant what was the big idea of arresting the defendant, that she came to get a sick man out of a hospital in Washington, D. C., and to take him home to his home in Bloomfield, N. J., and the very idea of charging her with being unlicensed second hand dealer, also the lieutenant informed her if she did not get her out Sunday May 12th, 1935, that to-morrow the bail would be increased from five hundred dollars to one thousand dollars cash bail. On cross examination she was asked when did she see the defendant for the first time since February 1935, in Washington, D. C., and she informed the court on the 12th day of May 1935, at the women's bureau. Witness also testified she saw the defendant at her home in Newark, N. J., ill on several of her trips to purchase merchandise for her business in the months of February, March, and April 1935.

21 RALPH WALLACE, being duly sworn, testified in substance as follows:

He resides in the City of Washington, D. C., for a great number of years and has known the defendant for some time. That he knows the defendant was critically ill and confined to her bed in the City of Newark, N. J., from February 1935 to the early part of May 1935. Witness testified he saw the defendant for the first time in the City of Washington, D. C., on the morning of May 12th, 1935, when he was advised she was arrested and at the women's bureau, that on the 12th day of May 1935, he was at detective headquarters and heard several detective men make a joke out of the arrest of the defendant and the witness remarked to the lieutenant at the desk that the conduct of the men should be reported to a committee, that it is an outrage to frame the defendant, which they have done in this case, particularly when she came to Washington, D. C., to get out a sick man to bring him back to his home in New Jersey, that this man was in a Washington, D. C. hospital. On cross examination he was asked how long has he known the defendant, to which he replied for a number of years and that he visited the defendant at her home during the months of February, March, and April 1935. That he goes to New York City frequently on buying trips, and that Newark, N. J., is about eight miles this side of New York City, N. Y. That he knows the defendant was very ill at her home in Newark, N. J., from February 1935 to the beginning of May 1935.

Mr. L. JOHNSTON, being duly sworn, testified in substance as follows:

He is employed by the metropolitan police department, in the capacity of a second hand and pawn broker inspector. He has been

employed in that capacity for more than two and half years
32 and he is the only inspector assigned to that work. That he is familiar with the rules and regulations regarding the reports of second hand dealers and pawn brokers and laws governing same. Second hand dealers and pawn brokers are compelled to make daily reports to the police department; that he produced the form they are required to use and submit to the department. The witness was shown six tickets which were offered in evidence and was asked whether in course of his inspection he came in contact with any of those unused portions excursion tickets among second hand dealers or pawn brokers, to which witness replied, "No", and that those tickets did not come within the second hand dealers' license as they were compelled to hold merchandise for ten days and that these tickets were good only on the date of purchase and would not be acceptable for transportation ten days later.

EDWARD M. WELLIVER, being duly sworn, testified in substance as follows:

He resides in the City of Washington, D. C., and has been in the employ of the corporation counsel office as an assistant corporation counsel for some time. That some time in April 1935, one Goldstein was arrested and brought in with forty-eight return excursion tickets to New York City, New York, and that the case against said Goldstein was dismissed. Mr. Curran, assistant corporation, objected, but the witness had already answered, so the defendant advised the court.

The defendant moved for a directed verdict of acquittal, upon the following grounds, first, that the District of Columbia failed to make out a case, the evidence did not warrant a conviction, the arrest was illegal, to which the court overruled the motion and the defendant took an exception. The Court then and there imposed the sentence of $300.00 fine or sixty days in jail.

33 The foregoing is the substance of all the testimony bearing upon the exceptions herein reserved on behalf of defendant.

And whereupon, and as all of said exceptions were duly noted and excepted and allowed as aforesaid and duly entered upon the minutes of the court, and because the matters and things hereinbefore recited are not matters of record, in order to make same a part of the record herein, which is hereby ordered, so that the defendant may have her case reviewed on appeal, the defendant moves the court to sign, and seal this, her bill of exceptions, to have the same force and effect as if each and every one of said exceptions has been separated, signed and sealed, which motion is granted by the court, and thereupon the defendant tenders this, her bill of exceptions, and requests the court to sign and seal the same, which is accordingly done, now for then, this 21st day of October, A. D. 1935.

(Signed) GUS A. SCHULDT,
Judge, Police Court.

34 In the Police Court of the District of Columbia. No. 1085464. District of Columbia vs. Ethel Clawans. Bill of exceptions. Ethel Clawans, 1060 Borad Street, Newark, N. J. October 21, 1935. Bill of exceptions settled, signed, sealed, and filed.

35 In the Police Court of District of Columbia

Holding a District Court

No. 1085464

DISTRICT OF COLUMBIA

v.

ETHEL CLAWANS

Request for continuance

The Government hereby requests a further extension of 10 days for the signing of the Bill of Exceptions in the above entitled case, for the reason that Mr. Edward M. Curran, who handled this matter is out of the city on a vacation.

(Signed) EDWARD M. WELLIVER,
Assistant Corporation Counsel,
Police Court, D. C.

Request granted:

(Signed) GUS A. SCHULDT, *Judge.*

36 Filed Aug. 5, 1935. F. A. Sebring, Clerk of Police Court, D. C.

37 In the Police Court of the District of Columbia

DISTRICT OF COLUMBIA

vs.

ETHEL CLAWANS, IN P. P., 1060 BROAD STREET, NEWARK, N. J.

Request for continuance for signing the bill of exceptions

The government hereby respectfully requests that the time for the signing of the Bill of Exceptions in the above entitled cause be extended for ten days (10), until the return of Mr. Curran from his vacation.

Respectfully submitted.

(Signed) EDWARD M. WELLIVER,
Assistant Corporation Counsel, D. C.,
Police Court.

38 In the Court of Appeals of the District of Columbia

DISTRICT OF COLUMBIA

vs.

ETHEL CLAWANS

Petition for further extension of time within to file bill of exceptions

Comes now the defendant in the above entitled case and moves this Honorable Court to extend further time within which to file

bill of exceptions, to and including the 14th day of October 1935, and for reasons therefor shows as follows:

1. That Judge Schuldt has failed to sign bill of exceptions submitted by the defendant nearly three months ago.

2. That the corporation counsel by one of his assistants, Edward M. Welliver, secured two continuances.

3. That the defendant has made six trips to Washington, D. C., solely for the purpose of Judge Schuldt to sign, seal bill of exceptions.

4. That defendant will be irreparably damaged and lose her right of appeal to this Honorable Court without an extension of time granted by this Court to seek relieve therein.

5. WHEREFORE, the premises considered, it is respectfully prayed than an ORDER be passed in this case extending the time within which to file the bill of exceptions to and including the 14th day of October 1935.

(Signed) ETHEL CLAWANS.

Service of the foregoing petition is acknowledged this 23rd day of September 1935.

39 No. ——. In the Court of Appeals of the District of Columbia. District of Columbia vs. Ethel Clawans. Petition for further extension of time within to file bill of exceptions. Ethel Clawans, 1060 Broad St., Newark, N. J.

40 In the Police Court of the District of Columbia

No.

DISTRICT OF COLUMBIA

vs.

ETHEL CLAWANS

Assignment or error

Now comes the defendant in the above-entitled case and assigns as errors committed in the course of the trial relied upon as grounds for reversing the conviction complained of herein, as follows:

The court erred:

1. In refusing to grant defendant's motion to quash service of a warrant of arrest made on the Lord's day, May 12th, A. D. 1935, for being an unlicensed second hand dealer.

2. In ordering the court room cleared and denying defendant the right to proceed in her defense in open court.

3. In demanding defendant to plead to an information.

4. In denying defendant's motion to assign case to another judge on the ground he was biased and prejudiced.

5. In refusing defendant's motion for a continuance in order to enable her to obtain counsel of her own choice, and prepare for trial.

6. In denying defendant's motion for a jury trial.

7. In instructing the prosecution witness Autwine Bazier not to answer on cross-examination the following question: "Do you want

the Court to believe that the defendant approached you out of a clear sky in the presence of about three thousand people and asked you to buy a return trip ticket to New York City, said witness having testified there were about three thousand people in Union Station at the time?"

8. In instructing prosecution witness Autwine Bazier
41 not to answer the following question, "Did you not make a purchase from some one else on that day?" and his answer was "Yes." The witness had already answered before the Court so instructed him not to answer.

9. In instructing said witness not to answer the following question, "Do you want the Court to believe that defendant took $1.50 out of your hand as witness so testified?"

10. In instructing the prosecution witness Mrs. Evelyn R. Simmons not to answer the following question, "Did you come down to Washington, D. C., by pre-arrangement?"

11. In instructing the witness Mrs. Evelyn R. Simmons not to answer the following question, "What time of day did you reach Washington, D. C., on the 7th day of April 1935, and 28th day of April 1935?"

12. In instructing witness for the prosecution, Earl R. Simmons, not to answer in cross-examination the following question. "Was the defendant pointed out to you?"

13. In instructing said witness not to answer in cross-examination the following question, "Did you come down to Washington, D. C., by prearrangement?"

14. In instructing said witness not to answer the following question on cross-examination, "Did you make a purchase on that day from anyone else?"

15. In instructing witness on cross-examination not to answer the following question, "What time of the day did you reach Washington, D. C., on the 7th day of April 1935, and 28th day of April 1935?"

16. In instructing Earl R. Simmons not to answer on cross-examination the following question, "Were Mr. Leaburger and Mr. Walter Axline known to you?"

17. In instructing the witness not to answer, "Where is your residence?"

42 18. In instructing said witness not to answer on cross examination the following question, "Did you know that the defendant was about to file a suit against the Pennsylvania Railroad as a result of an accident on the 4th day of November 1935?"

19. In instructing the prosecution witness, Walter Axline, not to answer the following question on cross examination, "Did you make a purchase from any one else on the 28th day of April 1935?"

19. In instructing the witness, Walter Axline, not to answer the following question on cross examination, "Did you see the defendant before the 28th day of April 1935?"

20. In instructing the witness not to answer the following question on cross examination, "You had no trouble in knowing the defendant, as she represented herself in the trial of this case?"

21. In instructing the prosecution witness, Samuel Leaburger, not to answer the following question in cross examination, "Did you

know that the defendant was about to bring a suit against the Pennsylvania Railroad as a result of an accident for injuries sustained on the 4th day of November 1935?"

22. In instructing said witness not to answer the following question on cross examination, "Did you know that the claims agent in Washington, D. C., had offered a settlement for her injuries she sustained on the 4th day of November 1935, and that the defendant refused the settlement of the case and advised she would settle with him in court?"

23. In instructing the witness, Mr. Leaburger, not to answer the following question, "Did you know Mr. & Mrs. E. R. Simmons before meeting them on the 28th day of April 1935?"

24. In instructing the witness not to answer on cross exam-
43 ination the following question, "Did you come down to Washington, D. C., with Mr. & Mrs. E. R. Simmons and Walter Axline by pre-arrangement?"

25. In instructing the witness, Sergeant Liverman, not to answer the following question on cross examination, "Isn't it true as a matter of fact you did not show the defendant the warrant of arrest on Sunday, May 12th, 1935?"

26. In not directing a verdict of acquittal at the conclusion of the prosecution's case.

27. The prosecution moved at the conclusion of the District of Columbia's case that all witnesses be excused from further attendance in the trial of this case, to which the defendant objected, the court erred in overruling said objection.

28. In overruling the objection of the defendant to the following question of the defendant's witness Lillian Clawans, "How much did you pay Miss C. Adams for her services?"

29. In overruling the defendant's objection to the question asked by the Assistant Corporation Counsel Curran on cross examination of the defendant's witness, Lillian Clawans, "Did you come down to Washington, D. C., by pre-arrangement?"

30. In striking out the following testimony of defendant's witness Madeline Mueller over the objection of the defendant, "I was in Court room on the 6th of June 1935 and saw a man whom she later learned was Mr. Murphy, of the Baltimore and Ohio Railroad Police, point the defendant out to several of the witnesses that testified for the prosecution before trial commenced and heard these witnesses state they were going to railroad the defendant."

31. In denying defendant's motion for a directed verdict at the conclusion of the entire case.

30A. In admitting evidence offered by the prosecution over the objection of the defendant.

32. In denying motion for a new trial.

44 33. In imposing sentence on the 7th day of June 1935 as follows: $300.00 and sixty days in jail, and thereafter modifying said sentence to $300.00 and ninety days in jail.

34. In refusing $500.00 cash bail after tendering same and imprisonment defendant 2½ hours before accepting $500.00 cash bail.

35. And for other errors apparent on the fact of the record.

(Signed) ETHEL CLAWANS.

Service of a copy of the foregoing assignment of errors acknowledged this 9th day of September 1935.

(Signed) G. D. NEILSON,
Asst. Corp. Counsel.

46 In the Police Court of the District of Columbia

No. 1085464

DISTRICT OF COLUMBIA

vs.

ETHEL CLAWANS

Information for violation act of Congress

Date		Proceedings
1935		
May	13	Information filed.
		Plea: Not Guilty—Cont'd to May 22, 1935.
"	16	Motion for Bill of Particulars and Motion to Vacate Service filed. Set for hearing May 18, 1935
"	18	Hearing on Motion set for May 22, 1935.
"	22	Motion for Bill of Particulars overruled. Exceptions noted. Motion to Vacate heard: briefs to be filed.
		Continued to May 29, 1935.
"	29	Motion to Vacate Service overruled. Exceptions allowed.
		Cont'd to June 6, 1935.
		Defendant failed to appear for trial: unsworn statement by physician filed. Case set for trial June 6, 1935. Attorney for Defendant notified in open court that defendant must appear for trial on day set, or furnish satisfactory evidence of her inability to appear.
June	6	Attorney Simon H. Broder allowed by Court to withdraw as defendant's counsel, with the consent of the defendant. Attorney Davison assigned by the Court. Defendant refused to accept service of the counsel assigned.
		Affidavit of prejudice filed. Motion overruled. Exceptions noted.
June	6	47 Attorney T. E. O'Connell assigned by the Court to represent defendant. Defendant refused counsel's services. Attorney Allen assigned by the Court. Defendant refused the services of the counsel.
		Continued to June 7, 1935. Request of defendant.
"	7	Attorney Lillian Clawans entered appearance for motions only.
"	7	Judgment guilty. Exceptions noted and notice given of intention of filing motion for a new trial.
		Continued to June 13, 1935.
"	11	Motion for new trial filed. Continued to June 22, 1935.
"	12	Affidavit of Sadie Frank filed. Affidavit of Arthur A. Cohen filed.
"	22	Continued to July 6, 1935. Request of defense. Attorney L. Clawans ill.
July	6	Motion for new trial overruled.
		Sentence: $300.00—60 days.
		Exceptions noted and notice given of intention of applying to the Court of Appeals for writ of error.
		Bond: $500.00 or $500.00 cash. Continued to July 12, 1935.
"	12	Bill of Exceptions submitted.
"	24	Continued to Aug. 5, 1935. First continuance.
		Bill of exceptions to be signed.
Aug.	5	48 Request of Government for extension of ten days for signing of bill of exceptions granted; Continued to Aug. 15, 1935.
"	16	Bill of exceptions to be signed. Second continuance.
Sep.	9	Assignment of Error filed.
Oct.	21	Bill of exceptions settled, signed, sealed and filed.
Nov.	18	Copy of record and proceedings in this case, together with writ of error, transmitted to Court of Appeals in obedience to said writ.

NOVEMBER 18, 1935.

I hereby certify under the seal of this Court, that the foregoing is a true copy of the records of the proceedings had in the Police Court in the above-entitled case.

[SEAL]

WM. A. NORGREN,
Acting clerk, Police Court, D. C.

49 UNITED STATES OF AMERICA, *ss:*

The President of the United States

To the Honorable GUS A. SCHULDT,
Judge of the Police Court of the District of Columbia.

GREETING: BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Police Court, before you, between District of Columbia, Plaintiff, and Ethel Clawans, Defendant, Information No. 1085464, a manifest error hath happened, to the great damage of the said Defendant as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Court of Appeals for the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable George E. Martin, Chief Justice of the said Court of Appeals, the 11th day of November, in the year of our Lord one thousand nine hundred and thirty-five.

[SEAL] HENRY W. HODGES,
Clerk of the United States Court of Appeals for the District of Columbia.

Allowed by
D. LAWRENCE GRONER,
Associate Justice of the United States Court of Appeals for the District of Columbia.

50 Police Court of the District of Columbia. No. 1085464. District of Columbia vs. Ethel Clawans. Violation act of Congress.

51 (Endorsed:) In Error to the Police Court of the District of Columbia. No. 6601. Ethel Clawans, plaintiff in error, vs. District of Columbia. United States Court of Appeals for the District of Columbia. Filed Nov. 18, 1935. Henry W. Hodges, Clerk.

52 Monday, April 6th, A. D. 1936

* * * * * * *

No. 6601

ETHEL CLAWANS, PLAINTIFF IN ERROR

vs.

DISTRICT OF COLUMBIA

The argument in the above entitled cause was commenced by Mr. Seth W. Richardson, attorney for plaintiff in error, and was con-

tinued by Mr. Raymond Sparks, attorney for defendant in error, and was concluded by Mr. Seth W. Richardson, attorney for plaintiff in error. Plaintiff in error is allowed to file reply brief in five days. (Mr. Justice Robb not sitting.)

53 United States Court of Appeals for the District of Columbia

No. 6601

ETHEL CLAWANS, APPELLANT

v.

DISTRICT OF COLUMBIA, APPELLEE

Appeal from the Police Court of the District of Columbia

Argued April 6, 1936—Decided May 11, 1936

Seth W. Richardson, of Washington, D. C., for appellant.
E. Barrett Prettyman, Corporation Counsel, D. C., Edward M. Curran, and Raymond Sparks, all of Washington, D. C., for appellee.

Before MARTIN, C. J., and VAN ORSDEL, GRONER, and STEPHENS, JJ.

GRONER, *J.:* Appellant was convicted in the police court of the District of Columbia of a violation of an Act of Congress of July 1, 1902, as amended by an Act approved July 1, 1932 (47 Stat. 550, ch. 366, sec. 7, paragraphs 39, 47, and 48), and sentenced to pay a fine of $300.00 or to confinement in jail for sixty days. Appellant, when arraigned, claimed the right to a jury trial in accordance with the provisions of Article III, sec. 2, cl. 3, of the Constitution, providing that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;". The right was denied, and the District of Columbia now insists that no constitutional privilege of appellant was invaded because of Title 18, Sec. 165, of the 1929 District of Columbia Code (16 Stat. 153, ch. 133; 26 Stat. 848, ch. 536; 31 Stat. 1196, ch. 854; 43 Stat. 1120, ch. 443, sec. 4), providing summary trial by a magistrate.

This last mentioned Act was passed for the government of the District of Columbia and provides that prosecutions in the police court shall be on information; that where the accused would be entitled to a jury trial under the Constitution, trial shall be by a jury unless waived; and that in cases where the accused would not by force of the Constitution be entitled to trial by jury, trial shall be by the court without a jury, unless, in cases where the fine or penalty may be more than $300.00 or imprisonment more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury.

The offense charged in the information was that appellant was engaged in the business of dealer in the return portions of railroad excursion tickets, contrary to the provisions of the Act of Congress approved July 1, 1932 (supra).

54 Paragraph 39 of that Act declares that dealers in second-hand personal property, including the return or other unused portion of any ticket, order, or token purporting to evidence the

right of the holder or possessor thereof to be transported by any railroad or other common carrier, from one state or territory of the United States or the District of Columbia, to any other state or territory of the United States or to the District of Columbia, shall pay a license tax of $50.00 per annum.

Paragraph 48, that any person violating the provisions of the Act "shall upon conviction be fined not more than $300 or imprisoned for not more than ninety days."

The answer to the question we have to decide depends, as we shall point out, upon whether the nature of the offense and the punishment prescribed bring it within the class of offenses described as "petty" in Schick v. United States, 195 U. S. 65.

In the Schick case—a prosecution by criminal information for violation of a section of the oleomargarine law punishable by a fine of $50.00—the Supreme Court said that, "So small a penalty for violating a revenue statute indicates only a petty offense", and held that in such circumstances there is no constitutional requirement of a jury.

On the other hand, in Callan v. Wilson, 127 U. S. 540—a prosecution for common law conspiracy—the defendant was charged with having, through an association of musicians, boycotted one of the members of the association and deprived him of his right to pursue his calling and trade. The defendant, in a summary proceeding and without a jury, was fined $25.00, and on petition for habeas corpus the Supreme Court held that the denial of a jury trial was a violation of his constitutional rights—because the offense charged was an indictable offense at common law.

And in District of Columbia v. Colts, 282 U. S. 63, a defendant charged with reckless driving in the streets of the city of Washington and sentenced to 30 days in jail was held entitled to a jury trial, also on the ground that the offense was indictable at common law.

In the two last mentioned cases the Supreme Court said that the provisions of the Constitution with relation to jury trial are to be read and interpreted in the light of the common law, and, as we have seen, held in each case that, since the offense charged was triable at common law only by jury, the constitutional provisions were violated by trial without one.

Obviously if the sole criterion is—whether the offense was triable only by jury at common law—the conviction here would have to stand, for the offense charged here was, perhaps, unknown to the common law. Also, if the test is whether the punishment which may be imposed is of a kind and nature which could be imposed in summary proceedings at the time of the adoption of the Constitution, the conviction would likewise have to stand; for the most casual examination of the history of the English criminal law from the time of James I to the time of our Revolution—and, as well, the history of criminal procedure in most of the American Colonies—shows unmistakably that summary proceedings, involving even severer punishments than the maximum provided under the statute in question, were not then uncommon. For example, many offenses not
55 only punishable by fines, but those also in which corporal punishment or imprisonment might be imposed, were both in England and in the Colonies tried solely by magistrates. Violations of laws relating to liquor, trade and manufacture, smuggling, traffic

on the highways, the Sabbath, cheats, gambling, swearing, small thefts, assaults, offenses to property, servants, and seamen, vagabondage, and disorderly conduct, were all in England by acts of Parliament offenses triable without a jury. In New York in 1732 statutes were passed making triable before magistrates any misdemeanor, breach of the peace, or other criminal offense under the degree of grand larceny. Nearly the same provisions may be found in the laws of New Jersey and Maryland and Virginia. Citations to the statutes and instances of their application are collected at great length in an article in the Harvard Law Review of June 1926 (Vol. XXXIX); and other like instances are cited in State v. Glenn, 54 Md. 572, where the Court of Appeals of Maryland, in passing upon the right to trial by jury of a person charged with being an habitually dissolute person and sentenced to serve six months in a house of correction, said:

"In England, notwithstanding the provision in the Magna Charta of King John, Art. 46, and that of 9 Hen. 3, ch. 29, which declares that no freeman shall be taken, imprisoned, or condemned, 'but by lawful judgment of his peers, or by the law of the land', it has been the constant course of legislation in that kingdom, for centuries past, to confer summary jurisdiction upon justices of the peace for the trial and conviction of parties for minor and statutory police offences; and this jurisdiction has been largely increased and extended in modern times, as will be seen by reference to Burn's Justice, tit. Conviction; Bacon's Abr., tit. Justice of the Peace, and Paley on Summary Convictions, 5 Ed. Work-houses and Houses of Correction, principally occupied by parties convicted by justices of the peace, have been maintained, certainly from the days of Queen Elizabeth to the present, as parts of the police system of that country; and both the jurisdiction and the means of punishment are deemed essential to the good government and well being of society there, and it is not less so here."

(The Court then reviews some of the earlier colonial statutes and says—p. 603):

"These statutes have been in force here from our earliest history, and are still in force; and we are not aware that it has ever been supposed that their provisions were in any way restrained or controlled by the declaratory provisions in the Declaration of Rights. There are a great many statutes upon the statute book, relating to a great variety of subjects, prescribing fines, penalties, and forfeitures, as punishment, for doing or omitting to do certain things; and by many of those statutes jurisdiction has been given to justices of the peace, from whose judgments no appeal was provided for until within a comparatively recent period."

But we think that the decision of the question involves more than is embraced in either indictability at common law or the power of magistrates to impose jail sentences pursuant to colonial statutes. For, as was said by the Supreme Court in Weems *v.* United States, 217 U. S. 349, it must not be overlooked that time works changes and brings into existence new conditions and purposes, and therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This principle is, as we think, clearly recognized in the opinion of the Supreme Court in the Schick case. That case, like this, embraced an offense unknown

to either the people of England or the United States at the
56 time of the adoption of the Constitution; and the holding that the offense was petty was placed on the ground that the penalty for its commission made it so. And so, logically and consistently, the Supreme Court said as to other provisions of the same statute imposing severer penalties, that the violation of one of these was a "crime" triable only to a jury. This distinction is an acknowledgment of the fact that the practice at the time of the adoption of the Constitution is not the only factor to be considered. This, indeed, the Supreme Court has said in so many words, viz.:

"The truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors." (Schick case, p. 68.)

The Colts case was decided a quarter of a century after the Schick case and, as we pointed out, turned exclusively on the nature of the offense. The statute provided only a maximum sentence of 30 days in jail, but this was held of no consequence since the offense itself was triable only by jury at common law. A fair inference, therefore, from the decisions in these two cases (Schick and Colts) is that the rule which the Supreme Court means to enforce is, first, that in all cases in which the offense charged is of a nature which at common law, as understood and practiced by our ancestors at the time of the adoption of the Constitution, was indictable and triable by a jury,—the trial now must be by jury unless waived; second, that in the case of offenses unknown to the common law or which then were regarded as petty, but which now Congress has declared shall be punished severely, the degree of punishment, rather than the nature of the offense, determines whether or not it is a crime within the constitutional limitations.

The offense with which we are here concerned is the breach of a municipal ordinance. It is an offense which, if known to the common law, was certainly regarded as petty,—an offense to which there is not attached any of the elements of moral turpitude. There is, therefore, nothing in the "nature of the offense" by which it may be characterized as a crime. It is of that class of cases described by Mr. Dillon in his work on Municipal Corporations (Vol. 1, Sec. 433), as falling within the description of municipal police regulations and which relate to acts and omissions not embraced in the general criminal legislation of the state. Such acts and omissions were regarded as innocent, or at least as trivial, one hundred and fifty years ago. Obviously, therefore, the doing of business without the payment of a license tax was not a crime within the contemplation of the makers of the Constitution or the people of the Colonies at the time of the adoption of the Constitution. And this brings us, then, to consider only the further question whether the extent of the punishment is so severe as to take the offense out of the category of "petty" and make it a "crime." As we have seen already, the statute permits a fine up to $300 or imprisonment up to ninety days in jail. The latter, that is to say, the right to impose a sentence of three months in jail by a magistrate without a jury, is the question on which the answer must turn. If, instead of three months in jail, the punishment provided were six months or a year, the problem would be simpler. So, also, if the punishment were, let us say, ten days in jail. The

57 difficulty is in applying the measuring rod to intermediate periods. As was suggested by the authors of the article in the Harvard Law Review to which we have made reference, the query is: When is far too far? All of which proves the unwisdom of attempting to deduce "from abstract principles any limiting definition of fundamental and constitutional rights." If Congress can deny or limit the right of jury trial in the District of Columbia, it can also deny and limit it wherever the jurisdiction of the United States extends, for the constitutional limitations apply in the District with the same force that they apply in the States. Callan *v.* Wilson, 127 U. S. 540; Downes *v.* Bidwell, 182 U. S. 244. And it is common knowledge that Congress never has attempted to confer jurisdiction on United States Commissioners or on the District Courts to try without a jury cases of the nature involved here. And in considering the question as applied solely to the District of Columbia, it is not amiss to refer to the fact that under the present statute there is not only a denial of jury trial but there is also no appeal of right to any superior court. The decision of the magistrate is final, unless upon application to this court we elect to exercise the power of review; and if we do, we are by rule confined to questions of law and may not weigh the evidence. In most of the States the mechanics of the law provide either a right of election on the part of the accused to be held over for trial in a court with a jury or an appeal of right to a higher court to review the judgment of the magistrate. The omission of either provision cannot and should not be lightly overlooked.

Viewed in this aspect, the penalty which may be imposed under the statute cannot be said to be petty or trivial. Laying aside the question of the right to impose a fine of $300, the right to imprison for three months involves a proposition of real seriousness. To inflict upon the accused, summarily, imprisonment in a common jail for that length of time, and at the same time to deny him of right an appeal to a court of record, is a matter which cannot be whistled down the wind with the statement that court business must go on—that dockets must be cleared—or that the requirements of jury service should not be expanded to the loss of the citizen in his private affairs. Nor is it any more an answer to say—as is not now uncommon—that the limitations and guaranties of the Constitution are now outworn or are unsuitable to the problems of government in the growth of population and the passing of time. That the guaranty of jury trial is, if it is, among the least of these, is not a reason for its abolition; nor does that fact justify whittling it down in civil and much less in criminal cases. It is still one of those immutable principles of justice which inhere in our conception of a free government; and it was doubtless this principle which induced the Supreme Court within the last year to say:

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right * * * should be scrutinized with the utmost care."—Dimich v. Schiedt, 293 U. S. at p. 486.

For these reasons, we are of opinion that the constitutional provisions with relation to jury trial apply, first, in all cases—especially in all cases where as here there is no election of right and no appeal of right—in which the offense charged was an indictable offense

58 under the common law, without regard to the measure of punishment; and, second, in all cases, without regard to the nature of the offense, where the punishment which may be inflicted under the statute involves a sentence as severe as confinement in jail for ninety days.

We have noted the other assignments and find them without substance. But, for denial of the right of jury trial, we are obliged to reverse and remand for a new trial.

Reversed.

A true copy.

Test:

Clerk of the United States Court of Appeals for the District of Columbia.

59 Monday, May 11th, A. D. 1936

* * * * * * *

No. 6601. April Term, 1936

ETHEL CLAWANS, PLAINTIFF IN ERROR

vs.

DISTRICT OF COLUMBIA

In error to the Police Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Police Court of the District of Columbia and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Police Court in this cause be, and the same is hereby, reversed, and that this cause be and the same is hereby remanded to the said Police Court for a new trial not inconsistent with the opinion of this Court.

Per Mr. Justice GRONER.

MAY 11, 1936.

Mr. Justice ROBB took no part in the consideration or decision of this case.

60 In the United States Court of Appeals for the District of Columbia

January Term, 1936

No. 6601

ETHEL CLAWANS, PLAINTIFF IN ERROR

v.

DISTRICT OF COLUMBIA, DEFENDANT IN ERROR

The clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the Court.
4. The judgment.
5. This designation.
6. Clerk's certificate.

VERNON E. WEST,
Acting Corporation Counsel, D. C.,
RAYMOND SPARKS,
Assistant Corporation Counsel, D. C.,
Attorneys for Defendant in Error, District Building.

Service of copy acknowledged this 12 day of May 1936.

SETH W. RICHARDSON,
Attorney for Plaintiff in Error.

61 No. 6601. Ethel Clawans, plaintiff in error, v. District of Columbia, defendant in error. Designation of record. United States Court of Appeals for the District of Columbia. Filed May 13, 1936. Moncure Burke, clerk. Vernon E. West, Raymond Sparks, attys. for defendant in error, District Building.

62 United States Court of Appeals for the District of Columbia

I, Moncure Burke, clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages numbered from 1 to 61, inclusive, constitute a true copy of the transcript of record and proceedings of the said Court of Appeals as designated by counsel for the defendant in error in the case of: Ethel Clawans, plaintiff in error, vs. District of Columbia, No. 6601, April Term, 1936, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 14th day of May A. D. 1936.

[SEAL]

MONCURE BURKE,
Clerk of the United States Court of Appeals
for the District of Columbia.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 103

In the Supreme Court of the United States

OCTOBER TERM, 1938

DISTRICT OF COLUMBIA, PETITIONER

v.

ETHEL CLAWANS

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

VERNON E. WEST,
Assistant Corporation Counsel, D. C.

RAYMOND SPARKS,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. —

DISTRICT OF COLUMBIA, PETITIONER

v.

ETHEL CLAWANS

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

PETITION

May it Please the Court: The petition of the District of Columbia respectfully shows to this Honorable Court:

STATEMENT OF THE MATTER INVOLVED

On May 13, 1935, an information was filed in the Police Court charging that the respondent:

> On the 24th day of March in the year A. D. 1935, in the District of Columbia, and divers other days and times between that date and the date of the filing of this information, did * * * engage in the business of a dealer in second-hand personal property, to wit, did

> then and there engage in the business of selling the return or other unused portions of railroad tickets, the same evidencing the right of the purchaser, holder or possessor thereof, to be transported by railroad from one state or territory of the United States, or from the District of Columbia to any other state or territory of the United States, or to the District of Columbia, without first having obtained a license so to do.

The respondent pleaded "Not Guilty" and demanded a trial by jury, which demand was denied and an exception noted. Upon a trial by the Court she was convicted and sentenced to pay a fine of $300 or, in default thereof, to serve a term of sixty days in jail.

Upon petition of the respondent, specifying several alleged errors in the trial of the cause, including the refusal to grant to a jury trial, the United States Court of Appeals for the District of Columbia allowed a writ of error. In its decision the Court found the other assignments of error to be without substance, but reversed the judgment of conviction upon the ground that respondent was entitled to trial by jury (R. 28).

QUESTION PRESENTED

The sole question is whether one charged with a violation of an Act of Congress, in the nature of a municipal ordinance, which provides a maximum penalty of $300 or ninety days, is entitled to trial

by jury, notwithstanding the provisions of an Act of Congress prescribing summary trials in such cases.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The United States Court of Appeals for the District of Columbia in this case has decided a question of substance relating to the construction and application of the Constitution of the United States and a statute enacted by Congress, which has not been, but should be, settled by this Court.

2. The United States Court of Appeals has decided that an offense, which, if known to the common law, was within the class of offenses then regarded as "petty", must be tried by jury, notwithstanding the punishment prescribed is less than that imposed after summary trial of certain petty offenses at common law.

3. The question is of great importance to the District of Columbia in the enforcement of the License Law, and numerous regulations promulgated thereunder, and may be of even greater importance throughout the country if Congress seeks more expeditious enforcement of the laws relating to minor offenses. The records of the Metropolitan Police Department of the District of Columbia show that more than three hundred and eighty persons were charged with violations of the License Law in the District of Columbia in the fiscal year 1935, and that approximately four hundred per-

sons were charged with such offenses in the fiscal year 1934. In addition, there are many charges of violations of regulations promulgated under authority of the License Law, the records of which are not segregated from records of violations of general police regulations.. The License Law requires the licensing of more than seventy forms of businesses, trades, occupations, and professions. The requirement of trial by jury in such cases would seriously impede the effective administration of this and similar laws.

4. This Court should determine whether the offense of engaging in a business without a license, for which a maximum sentence of $300 or ninety days may be imposed, is to be classed as a "crime" and tried by jury as a "criminal prosecution."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6601, *Ethel Clawans, Plaintiff in Error,* v. *District of Columbia, Defendant in Error,* and that the said judgment of the United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your peti-

tioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

DISTRICT OF COLUMBIA,
By VERNON E. WEST,
Acting Corporation Counsel, D. C.
RAYMOND SPARKS,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION BELOW

No opinion was rendered by the Police Court. The opinion of the United States Court of Appeals (R. 23–28) is not reported.

II

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on May 11, 1936. The jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

III

STATEMENT OF THE CASE

A statement of the facts will be found in the petition.

IV

SPECIFICATION OF ERRORS

The United States Court of Appeals erred:

1. In holding that the respondent was entitled to a trial by jury.

2. In holding that the offense of engaging in the business of a second-hand dealer without a license, as defined and punished in the License Act of the District of Columbia, is a crime within the meaning of the Constitution of the United States.

3. In holding that the Act of Congress which specifies petty offenses triable without a jury is unconstitutional.

4. In holding that the absence of an absolute right of appeal is a factor to be considered in determining whether trial by jury is required.

V

PROVISIONS OF CONSTITUTION AND OF STATUTES INVOLVED

Article III, Section 2, Clause 3, of the Constitution provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury. * * *

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. * * *

Section 44 of the 1901 Code of the District of Columbia (31 Stat. 1189), as amended by the Act of Congress approved March 3, 1925 (43 Stat. 1119), provides, in pertinent part, as follows:

> That prosecutions in the police court shall be on information by the proper prosecuting

officer. In all prosecutions within the jurisdiction of said court in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial shall be by such judge, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury.

In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury * * *.

The decision of the lower court, in effect, renders this Act of Congress unconstitutional.

Section 7 of the Act approved July 1, 1902 (32 Stat. 622, c. 1352), as amended by the Act approved July 1, 1932 (47 Stat. 550, c. 356), provides, in part, as follows:

> PAR. 1. No person shall engage in or carry on any business, trade, profession, or calling in the District of Columbia for which a license fee or tax is imposed by the terms of this section without having first obtained a license so to do. * * *

PAR. 39. Dealers in secondhand personal property, including the return or other unused portion of any ticket, order, or token purporting to evidence the right of the holder or possessor thereof to be transported by any railroad or other common carrier, however operated, from one State or Territory of the United States, or from the District of Columbia, to any other State or Territory of the United States or to the District of Columbia shall pay a license tax of $50 per annum. Every person engaged in the business of buying, selling, trading, exchanging, or dealing in secondhand personal property of any description, including the return or unused portion of any such ticket, order, or token, shall be regarded as a secondhand dealer. * * *

PAR. 47. Prosecutions for violations of any of the provisions of this section, or of any paragraph added hereto from time to time by the Commissioners of the District of Columbia, or of any regulation made by the commissioners under authority of this section, shall be on information in the police court of the District of Columbia by the corporation counsel of the District of Columbia or any of his assistants.

PAR. 48. Any person violating any of the provisions of this section, or additions thereto made from time to time by the Commissioners of the District of Columbia, where no specific penalty is fixed, or the violation of any regulation made by the commissioners under the authority of this sec-

tion, shall upon conviction be fined not more than $300 or imprisoned for not more than ninety days.

VI

ARGUMENT

A. THE CONSTITUTION DOES NOT REQUIRE THE TRIAL OF PETTY OFFENSES BY JURY

In *Schick* v. *United States,* 195 U. S. 65, where the court sustained the waiver of a jury in a trial where the maximum punishment was a fine of fifty dollars, the court declared that the provisions of the Constitution for trial by jury did not extend to petty offenses, saying (pp. 68, 70):

> The truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses. * * *
>
> When the change was made from "criminal offenses" to "crimes", and made in the light of the popular understanding of the meaning of the word "crimes", as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses.

The test prescribed in the *Schick case, supra,* was qualified in *Colts* v. *District of Columbia,* 282 U. S. 63, 73, where the defendant was convicted in the Police Court of the District of Columbia of the offense of "Reckless Driving." This Court found

that the offense was *malum in se* and was indictable at common law, and said:

> Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense.

In *Callan* v. *Wilson,* 127 U. S. 540, the Police Court of the District of Columbia had tried a defendant charged with conspiracy and had refused his demand for a jury. The sentence which was actually imposed in this case was a light one; but under the common law which was then in force in the District of Columbia (Rev. Stat. Dist. Col., sec. 92; *State* v. *Buchanan,* 5 Harris & Johnson (Md.) 317, 360) conspiracy was punishable by imprisonment for more than one year at the discretion of the court (Rev. Stat. Dist. Col., secs. 1144, 1049; *United States* v. *Marshall,* 17 D. C. 34; *Palmer* v. *Lenovitz,* 34 App. D. C. 303, 305). This Court found that the offense was a crime indictable at common law, and said (p. 555):

> Without further reference to the authorities, and conceding that *there is a class of petty or minor offenses, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury, and which, if committed in this District, may, under the authority of Congress, be tried by the court and without a jury,* we are of opinion that the offense with

> which the appellant is charged does not belong to that class. * * *. It is an offense of a grave character, affecting the public at large, * * * (p. 556). [Italics ours.]

In *Patton et al.* v. *United States,* 281 U. S. 276, 312, this Court said:

> Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases *above the grade of petty offenses.* [Italics ours.]

A violation of the License Law is a petty offense. The offense is not included in a criminal statute but was specifically provided for originally in an Appropriation Act for the District of Columbia. It deals simply with local conditions, is designed to provide revenue and to insure the regulation of certain occupations and businesses by local municipal authorities.

The United States Court of Appeals, in its decision in the case at bar, admitted the offense of doing business without a license was, if known to the common law, regarded as petty; that it contained no element of moral turpitude; and that there is nothing in the nature of the offense by which it may be characterized as a crime (R. 26). The Court, however, decided that a jury trial was required in prosecutions under the License Act upon the ground that the extent of the punishment provided thereby is so severe as to take the offense out of the category of "petty" and make

it a "crime", especially where, as here, no absolute right of appeal exists from the Police Court to the United States Court of Appeals (R. 27, 28). This decision invokes a novel construction of the Constitution and violates the cardinal rule laid down by this Court that the Third Article of the Constitution, relating to trial by jury,

> is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. (*Callan* v. *Wilson,* 127 U. S. 540, 549.)

This general principle was reaffirmed in *Ex Parte Grossman,* 267 U. S. 87, 108, where this Court said:

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.

B. DECISIONS OF STATE COURTS SUPPORT THE POSITIONS THAT AN OFFENSE SUCH AS IS HERE INVOLVED MAY BE TRIED BY SUMMARY PROCEDURE

In *Bray* v. *State* (1903), 140 Ala. 172, a defendant was denied a jury in a prosecution for violation of an ordinance which punished failure to pay hack fare. He was convicted and sentenced to six months at hard labor. Trial without jury was sustained.

In *State* v. *Parker* (1924), 87 Fla. 181, an ordinance forbade any one to operate an automobile while intoxicated, under penalty of imprisonment

for not less than thirty nor more than sixty days for the first offense. The defendant was tried by the municipal court without the right to trial by jury. He was found guilty and sentenced to imprisonment for thirty days. Trial without jury was sustained.

In *State* v. *Glenn* (1880), 54 Md. 572, an habitually disorderly person was tried without a jury and sentenced to six months in the house of correction. The trial was sustained. See especially pages 599 to 606. In *Lancaster* v. *State* (1899), 90 Md. 211, a statute authorized police justices to try for assaults without jury. The statute was held valid. The sentence was eighteen months imprisonment. See also *State* v. *Loden,* 117 Md. 373.

In *State* v. *Broms* (1918), 139 Minn. 402, the defendant was prosecuted under an ordinance for disorderly conduct, was convicted and sentenced to hard labor for ninety days. The Court held that he was not entitled to a jury trial. In *State* v. *Anderson* (1925), 165 Minn. 150, the court decided that one who was accused of selling intoxicating liquor unlawfully in violation of an ordinance was not entitled to trial by jury. In that case the defendant was sentenced to imprisonment for ninety days.

In *Bell* v. *State* (1920), 104 Neb. 203, and *State* v. *Kacin* (1932), 241 N. W. 785, 123 Neb. 64, a State law forbade the possession and transportation of intoxicating liquors. Magistrates and po-

lice courts were empowered to try without jury all violations of that act and all violations of ordinances where the penalty did not exceed a fine of one hundred dollars or imprisonment for three months. The statute was sustained.

In *State* v. *Ruhe* (1898), 24 Nev. 251, in *quo warranto* proceedings the court sustained a statute which provided that trials for the infraction of ordinances of a police nature should be summary in character before the police judge without a jury. By statute the jurisdiction of the police judge included cases in which he might impose fine or imprisonment or both.

In *People* v. *Harding* (1921), 189 N. Y. Supp. 657, the court held that one who is accused of vagrancy is not entitled to trial by jury even though upon conviction he might be sentenced to three years in a correctional institution or to one year in a jail or penitentiary. *In Matter of Cooley* v. *Wilder,* 234 App. Div. 256, the court sustained a sentence of six months in jail where trial by jury was not allowed the defendant. See also *People* v. *Stein* (1903), 80 App. Div. 357.

In *Byers and Davis* v. *Commonwealth* (1862), 42 Pa. St. 89, an act authorized the mayor or police magistrate to try a professional thief or pickpocket who frequented designated places for an unlawful purpose and if he were found guilty to commit him to hard labor in the county jail for not more than ninety days. The defendants were tried without

a jury, were convicted, and were sentenced to hard labor in jail for ninety days. The act was sustained. See especially pages 94 to 96.

Petitioner has been unable to find any decision of the Federal Courts bearing specifically upon the point under consideration here.

C. CONGRESS HAS NOT CURTAILED THE RIGHT OF TRIAL BY JURY

By enactment of the Act of March 3, 1925 (43 Stat. 1119), Congress has prescribed trial by jury for offenses punishable by more than $300 or ninety days, thereby actually reducing the number of offenses, involving violations of statutes in the nature of municipal ordinances, which otherwise, under the Constitution, may be tried summarily. There is no question that such offenses involving sentences greater than 90 days were tried summarily at common law (R. 24, 25). (Harvard Law Review, June 1926, Vol. XXXIX; *State* v. *Glenn*, 54 Md. 572.) In the opinion of the lower Court it appears to be conceded that the offense here is within that class, both as to its nature and the punishment which may be imposed.[1] This Court has

[1] The offense with which we are here concerned is the breach of a municipal ordinance. It is an offense which, if known to the common law, was certainly regarded as petty—an offense to which there is not attached any of the elements of moral turpitude. There is, therefore, nothing in the "nature of the offense" by which it may be characterized as a crime. It is of that class of cases described by Mr. Dillon

said that the provisions of the Constitution prescribing trial by jury are to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. *Callan* v. *Wilson*, 127 U. S. 540, 549. If violations of laws in the nature of municipal ordinances were tried summarily at common law, offenses within the same class involving similar punishment may now be tried summarily. Obviously, therefore, Congress has not ignored the constitutional requirements, but, on the contrary, it has enlarged the class of cases triable by jury.

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in his work on Municipal Corporations (Vol. 1, Sec. 433), as falling within the description of municipal police regulations and which relate to acts and omissions not embraced in the general criminal legislation of the state. Such acts and omissions were regarded as innocent, or at least as trivial, one hundred and fifty years ago. Obviously, therefore, the doing of business without the payment of a license tax was not a crime within the contemplation of the makers of the Constitution or the people of the Colonies at the time of the adoption of the Constitution (R. 26).

* * * if the test is whether the punishment which may be imposed is of a kind and nature which could be imposed in summary proceedings at the time of the adoption of the Constitution, the conviction would likewise have to stand; for the most casual examination of the history of the English criminal law from the time of James I to the time of our Revolution—and, as well, the history of criminal procedure in most of the American Colonies—shows unmistakably that summary proceedings, involving even severer punishments than the maximum provided under the statute in question, were not then uncommon (R. 24).

D. THE ABSENCE OF AN ABSOLUTE RIGHT OF APPEAL DOES NOT AFFECT THE RIGHT OF TRIAL BY JURY

The United States Court of Appeals based its decision upon the extent of punishment which may be imposed, laying stress upon the fact that appeal from the Police Court is not a right but exists only by writ of error issuable in the discretion of the Appellate Court (R. 27). The Court concluded (R. 27, 28):

> For these reasons, we are of opinion that the constitutional provisions with relation to jury trial apply, first, in all cases—*especially in all cases where as here there is no election of right and no appeal of right*—in which the offense charged was an indictable offense under the common law, without regard to the measure of punishment; and, second, in all cases, without regard to the nature of the offense, where the punishment which may be inflicted under the statute involves a sentence as severe as confinement in jail for ninety days. [Italics supplied.]

This Court has repeatedly held that a review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, is not a necessary element of due process of law (*McKane* v. *Durston,* 153 U. S. 684, 686; *Andrews* v. *Swartz,* 156 U. S. 276; *Murphy* v. *Massachusetts,* 177 U. S. 155). It is presumed that the appellate court will grant a writ of error in a proper case, thus insuring the defend-

ant a review in cases where error is brought to the attention of the appellate court.

In the case of *State* v. *Loden,* 117 Md. 373 (1912), the Court sustained a statute which empowered police magistrates to try without a jury violations of a license law where the maximum penalty of $50 or ninety days, or both, could be imposed, and where no right of appeal was provided. See especially pages 385 and 386.

VII

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that a proper construction of the Constitution and of the Acts of Congress involved may be had, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia and finally reverse it.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 103

DISTRICT OF COLUMBIA, PETITIONER

v.

ETHEL CLAWANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE DISTRICT OF COLUMBIA

OPINION BELOW

No opinion was rendered by the Police Court. The opinion of the United States Court of Appeals (R. 23–28) is reported in 84 Fed. (2d) 265.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on May 11, 1936, (R. 23). The petition for certiorari, filed June 8, 1936, was granted October 12, 1936. Jurisdiction to issue the writ is conferred by Sec-

tion 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

On May 13, 1935, an information was filed in the Police Court charging that the respondent:

> On the 24th day of March in the year A. D. 1935, in the District of Columbia, and divers other days and times between that date and the date of the filing of this information, did * * * engage in the business of a dealer in second hand personal property, to wit, did then and there engage in the business of selling the return or other unused portions of railroad tickets, the same evidencing the right of the purchaser, holder or possessor thereof, to be transported by railroad from one state or territory of the United States, or from the District of Columbia to any other state or territory of the United States, or to the District of Columbia, without first having obtained a license so to do.

The respondent pleaded "Not Guilty" and demanded a trial by jury, which demand was denied and an exception noted. Upon a trial by the Court she was convicted and sentenced to pay a fine of $300 or, in default thereof, to serve a term of sixty days in jail.

Upon petition of the respondent, specifying several alleged errors in the trial of the cause, including the refusal to grant a jury trial, the United States Court of Appeals for the District of Colum-

bia allowed a writ of error. In its decision the Court found the other assignments of error to be without substance, but reversed the judgment of conviction upon the ground that respondent was entitled to trial by jury (R. 28).

On October 12, 1936, this Court granted a writ of certiorari.

QUESTION PRESENTED

The sole question is whether one charged with a violation of an Act of Congress, in the nature of a municipal ordinance, which provides a maximum penalty of $300 or ninety days, is entitled to trial by jury, notwithstanding the provisions of an Act of Congress prescribing summary trials in such cases.

SPECIFICATION OF ERRORS

The United States Court of Appeals erred:

1. In holding that the respondent was entitled to a trial by jury.

2. In holding that the offense of engaging in the business of a secondhand dealer without a license, as defined and punished in the License Act of the District of Columbia, is a crime within the meaning of the Constitution of the United States.

3. In holding that the Act of Congress which specifies petty offenses triable without a jury is unconstitutional.

4. In holding that the absence of an absolute right of appeal is a factor to be considered in determining whether trial by jury is required.

100697—36——2

PROVISIONS OF CONSTITUTION AND OF STATUTES INVOLVED

Article III, Section 2, Clause 3, of the Constitution provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury. * * *

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. * * *

Section 44 of the 1901 Code of the District of Columbia (31 Stat. 1189), as amended by the Act of Congress approved March 3, 1925 (43 Stat. 1119), provides, in pertinent part, as follows:

> That prosecutions in the police court shall be on information by the proper prosecuting officer. In all prosecutions within the jurisdiction of said court in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial shall be by such judge, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury.

> In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury * * *.

The decision of the lower court, in effect, renders this Act of Congress unconstitutional.

Section 7 of the Act approved July 1, 1902 (32 Stat. 622, c. 1352), as amended by the Act approved July 1, 1932 (47 Stat. 550, c. 356), provides, in part, as follows:

> Par. 1. No person shall engage in or carry on any business, trade, profession, or calling in the District of Columbia for which a license fee or tax is imposed by the terms of this section without having first obtained a license so to do. * * *
>
> Par. 39. Dealers in secondhand personal property, including the return or other unused portion of any ticket, order, or token purporting to evidence the right of the holder or possessor thereof to be transported by any railroad or other common carrier, however operated, from one State or Territory of the United States, or from the District of Columbia, to any other State or Territory of the United States or to the

District of Columbia shall pay a license tax of $50 per annum. Every person engaged in the business of buying, selling, trading, exchanging, or dealing in secondhand personal property of any description, including the return or unused portion of any such ticket, order, or token, shall be regarded as a secondhand dealer. * * *

PAR. 47. Prosecutions for violation of any of the provisions of this section, or of any paragraph added hereto from time to time by the Commissioners of the District of Columbia, or of any regulation made by the Commissioners under authority of this section, shall be on information in the police court of the District of Columbia by the corporation counsel of the District of Columbia or any of his assistants.

PAR. 48. Any person violating any of the provisions of this section, or additions thereto made from time to time by the Commissioners of the District of Columbia, where no specific penalty is fixed, or the violation of any regulation made by the commissioners under the authority of this section, shall upon conviction be fined not more than $300 or imprisoned for not more than ninety days.

SUMMARY OF ARGUMENT

The Constitution does not require the trial of petty offenses by jury. The character of such offenses is determined by reference to the procedure at common law.

At common law, prior to the adoption of the Constitution, there were many offenses, both in England and America, in the trial of which no jury was allowed. These included not only offenses punishable by fines, but others in which corporal punishment or imprisonment might be imposed.

The decisions of State courts, where similar constitutional restrictions are provided, support the position that an offense such as is here involved may be tried by summary procedure.

The License Law is in the nature of a municipal ordinance and Congress has properly treated a violation of the law as a petty offense.

The absence of an absolute right of appeal does not affect the right of trial by jury.

ARGUMENT

I

THE CONSTITUTION DOES NOT REQUIRE THE TRIAL OF PETTY OFFENSES BY JURY. THE CHARACTER OF SUCH OFFENSES IS DETERMINED BY REFERENCE TO THE PROCEDURE AT COMMON LAW

In *Schick* v. *United States*, 195 U. S. 65, where the court sustained the waiver of a jury in a trial where the maximum punishment was a fine of fifty dollars, the court declared that the provisions of the Constitution for trial by jury did not extend to petty offenses, saying (pp. 68, 70):

> The truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes deter-

> mine whether it is to be classed among serious or petty offenses. * * *
>
> When the change was made from "criminal offenses" to "crimes", and made in the light of the popular understanding of the meaning of the word "crimes", as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses.

The test prescribed in the *Schick case, supra,* was qualified in *Colts* v. *District of Columbia,* 282 U. S. 63, 73, where the defendant was convicted in the Police Court of the District of Columbia of the offense of "Reckless Driving." This Court found that the offense was *malum in se* and was indictable at common law, and said:

> Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense.

In *Callan* v. *Wilson,* 127 U. S. 540, the Police Court of the District of Columbia had tried a defendant charged with conspiracy and had refused his demand for a jury. The sentence which was actually imposed in this case was a light one; but under the common law which was then in force in the District of Columbia (Rev. Stat. Dist. Col., sec. 92; *State* v. *Buchanan,* 5 Harris & Johnson (Md.) 317, 360) conspiracy was punishable by im-

prisonment for more than one year at the discretion of the court (Rev. Stat. Dist. Col., secs. 1144, 1049; *United States* v. *Marshall,* 17 D. C. 34; *Palmer* v. *Lenovitz,* 34 App. D. C. 303, 305). This Court found that the offense was a crime indictable at common law, and said (p. 555):

> Without further reference to the authorities, and conceding that *there is a class of petty or minor offenses, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury, and which, if committed in this District, may, under the authority of Congress, be tried by the court and without a jury,* we are of opinion that the offense with which the appellant is charged does not belong to that class. * * * It is an offense of a grave character, affecting the public at large * * *. (p. 556) (Italics ours.)

In *Patton et al.* v. *United States,* 281 U. S. 276, 312, this Court said:

> Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases *above the grade of petty offenses.* [Italics ours.]

To determine whether a given offense is within the class termed "petty offenses", and thus, under the Constitution, triable without a jury, reference must be had to the procedure at common law. In

Callan v. *Wilson, supra,* this Court declared that the provisions of the Third Article of the Constitution, relating to trial by jury are,

> to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury.

This cardinal rule was reaffirmed in *Colts* v. *District of Columbia, supra,* where it was said:

> This provision is to be interpreted in the light of the common law, according to which petty offenses might be proceeded against summarily before a magistrate sitting without a jury.

Similarly, in *Ex Parte Grossman,* 267 U. S. 87, 108, this Court said:

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.

It is clear, therefore, that petty offenses are exempt from the provisions of Article III which require trial by jury. Furthermore, it is certain, under the decision of this Court, that an offense, within the class of those offenses tried summarily at common law, is a "petty offense", and is not required under Article III to be tried by jury.

II

AT COMMON LAW, PRIOR TO THE ADOPTION OF THE CONSTITUTION, THERE WERE MANY OFFENSES, BOTH IN ENGLAND AND AMERICA, IN THE TRIAL OF WHICH NO JURY WAS ALLOWED. THESE INCLUDED NOT ONLY OFFENSES PUNISHABLE BY FINES, BUT OTHERS IN WHICH CORPORAL PUNISHMENT OR IMPRISONMENT MIGHT BE IMPOSED

Prior to the adoption of the Constitution Parliament had enacted a number of statutes for the trial of criminal offenses by justices of the peace without providing for the participation of juries, not only when fines were authorized but also when conviction might be followed by whipping or imprisonment. The statutes thus granting the power of summary conviction are discussed in Blackstone, Commentaries, IV, 280; Paley, Summary Convictions, Introduction; Webb, English Local Government: Parish and County, 419; Jenks, Short History of English Law, Eng. ed., 153, 154; Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 925, 929. Under such statutes, a servant who assaulted his master or overseer (5 Eliz., c. 4, Sec. 21), or a maker of false prophesies for the purpose of disturbing the realm (5 Eliz., c. 15) might be imprisoned for one year; anyone who cut growing grain or robbed orchards might be whipped (43 Eliz., c. 7); a silk-winder who embezzled goods committed to him might be whipped or set in the stocks (13 and 14

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Car. II, c. 15); anyone who maliciously injured trees might be put to hard labor in the house of correction for three months (1 Geo. I, Stat. 2, c. 48; 6 Geo. I, c. 16); men who lurked near the shore in order to aid smugglers might be committed to the house of correction to be whipped and kept at hard labor for not more than a month (9 Geo. II, c. 35, Sec. 18); one who removed rushes which had been planted to preserve sand hills was to be fined for the first offense, but for the second offense might be committed to the house of correction for one year, to be whipped and kept at hard labor (15 Geo. II, c. 33, Sec. 6); and vagabonds might be sentenced to imprisonment for six months, and an incorrigible rogue for two years, with whippings, (17 Geo. II, c. 5).

In the American Colonies and States there were many instances of laws for the trial of criminal offenses which did not provide for the participation of juries.

Thus, in New Hampshire the laws provided that many offenses were to be tried before one or two justices of the peace and said nothing whatever concerning juries in trials before those justices although the laws carefully provided for juries in trials before other tribunals. If any persons who had been convicted of adultery and sentenced to wear the capital letter "A" upon their outer garments were at any time found without the letter so worn, "they shall by warrant from a justice of the

peace be forthwith apprehended and ordered to be publicly whipped, not exceeding fifteen stripes." (Act of June 14, 1701, Laws of New Hampshire, compiled by A. S. Batchellor and successors, I, 676). Any Indian, negro or slave who was abroad in the night time after nine o'clock, unless upon an errand for his master, was to be sent by any justice of the peace to the house of correction, to receive the discipline of the house, and where there was no house of correction he was to be openly whipped by the constable, not exceeding ten stripes, (1714, Laws, II, 138). Justices of the peace might send vagrants to the workhouse, (1718, II, 266). Any negro, Indian or mullatto servant breaking a street lamp might be whipped ten stripes for the first offense and twenty stripes for a later offense, (1754, III, 72; see also V, 691). The disorderly celebrating of Guy Fawkes Day might be punished by imprisonment for forty-eight hours (1768, III, 514); and the disorderly celebrating of Christmas, gaming in public places or driving through the public streets of a town faster than five miles an hour, might be punished by imprisonment for forty-eight hours or setting in the stocks for two hours, (1771, III, 564); a grantor who refused to acknowledge his deed could be sent to prison without bail until he acknowledged the deed (1771, c. 12, sec. 32); rogues, beggars, persons using any subtle craft or unlawful games or pretending they could tell fortunes, common drunkards, common night

walkers, etc., were sent to the house of correction to be there kept *indefinitely* and required to work if able (1771, c. 61, secs. 2, 3; c. 87, sec. 7); a person assaulting a woman in the fields, streets, or lanes of a town, or defacing her attire or ornaments or attempting same could be tried by two justices of the peace and sentenced to ten stripes or committed to the house of correction for thirty days and required to furnish sureties (1771, c. 65, sec. 2). The laws authorized justices of the peace to impose fines for many offenses. In these trials without jury, if those who were fined did not pay the fine promptly the alternative punishments were often severe. For profanity one might be sentenced to ten days in jail (1747, III, 29; 1791, V, 651; for Sabbath-breaking, forty days (1785, V, 75); one who killed deer out of season might be sent to the workhouse for forty days for the first offense and fifty days for every subsequent offense (1740/1, II, 585; see also 1778, IV, 183); one who broke a street lamp and did not pay his fine within six hours after sentence might be punished by imprisonment for six months (1754, III, 72); the refusal to take oaths prescribed instead of the oaths of allegiance was tried by two justices of the peace who could impose imprisonment for three months upon failure to pay forty shillings and furnish security for good behavior and appearance at next quarter sessions (1771, c. 1, sec. 1); affrayers, rioters, disturbers or breakers of the peace and persons going about of-

fensively armed and making threatening speeches could be imprisoned until sureties for good behavior were furnished (1771, c. 11, sec. 5); one who published a lie or libel could be committed until a fine of twenty shillings was paid and sureties for good behavior furnished (1771, c. 11, sec. 6); and one who spoke against the war with Great Britain might be sentenced to six months imprisonment if he did not pay his fine (1777, IV, 75). The constitution of 1784, in section 15 of the bill of rights, provided that no one might be deprived of his life, liberty or estate but by the judgment of his peers or the law of the land. There was no other provision for the trial of criminal offenses by jury.

After reviewing these laws, the Supreme Court in *State* v. *Jackson*, 69 N. H. 511, 518, observed:

> It will be noted that by these statutes, with the exception of the last one, the largest fine which a justice was authorized to impose was forty shillings, and the longest definite term of imprisonment was three months, authority being given in certain cases to imprison in the house of correction for an indefinite term; * * *. Jurisdiction of offenses punishable more severely was given to the court of quarter sessions, or some other court having a jury. Such was the state of the law on the subject in 1784, when the constitution was adopted.

In 1630 the Court of Assistants of Massachusetts Bay, which exercised legislative, executive and

judicial powers, ordered that justices of the peace were "in all things to have like power that justices of the peace hath in England for reformation of abuses and punishing of offenders; and that any justice of the peace may imprison an offender, but not inflict any corporal punishment without the presence and consent of some one of the assistants." (Records of the Colony of Massachusetts Bay, Shurtleff, I, 74). The Court itself punished a colonist who had been injuring Indians by sending him to the bilbowes, confiscating his property and sending him back to England. (Same, 75); a servant was whipped for misdemeanor towards his master (p. 81); a man was whipped for shooting at fowl on the Sabbath (p. 82); a man was whipped, had his ears cut off and was fined and banished for speeches against the government and the church of Salem (1631, p. 88); a man for attempted rape, swearing and breaking into a house was sentenced to a whipping of thirty stripes, a year's imprisonment at hard labor and coarse diet, and to wear an iron collar, (1636, p. 177); and other similar punishments were imposed (1631, pp. 90, 91, 92, 1632, pp. 99, 100, 101). During this period juries are noted only in a civil case (1631, p. 86) and in cases involving murder or manslaughter (1630, p. 81, 1637, pp. 202, 203). It was not until four years after the settlement that it was ordered that no trial should pass upon life or banishment but by jury or by the General Court (1634, p. 118; and

see p. 312). By Province Laws 1693, c. 9, Acts and Resolves, I, 122, a justice might "punish breakers of the peace, prophaners of the Sabbath, and unlawful gamesters, drunkards, or prophane swearers or cursers, by setting in the stocks, or putting into the cage, not exceeding three hours, or imprisonment twenty-four hours, or by whipping, not exceeding ten stripes, as the case may deserve, and where the offender has not wherewithall to satisfy the law in that case provided." It seems that where the laws provided for fine or alternative corporal punishment it was not always possible for the offender to avoid corporal punishment by paying the fine. (See also, for example, Laws 1705–6, c. 5, Sec. 6, Acts and Resolves, I, 573; Laws 1711–12, c. 6, Sec. 13, I, 679, 681). A justice might try and might fine or punish those who, for example, refused to serve in public office (1720, II, 185; 1731, II, 599; see also 1761, IV, 462; Act of May 8, 1781, c. 10); sold liquor without a license (1711, I, 679, 681) or to Indians (1765, IV, 763—forty shillings or three months); or demanded money when armed or at night time when accompanied by others or built a bonfire within ten perches of any building (1756, III, 997—forty shillings or one month). Persons who led idle or disorderly lives might be committed to the house of correction, to be kept at hard labor until discharged by order of the justice of the peace or by the sessions court (1699, I, 378; 1720, II, 182; 1731,

II, 579; 1770, V, 46) or might be sentenced to three hours in the stocks or to ten stripes (1770, V, 46). The Act of March 26, 1788, c. 21, p. 680, authorized one justice of the peace to send beggars, fortune-tellers, common drunkards and idle and disorderly persons to the house of correction, to be kept there until discharged by the overseers of the poor. For the second offense of profanity one might be placed in the stocks or whipped (1731, II, 700). An Act of 1777 (V, 626), which authorized a justice of the peace to commit a deserting soldier and notify his commanding officer but did not authorize any fine, stipulated that if the offender were unable to pay such fine the justice might sentence him to thirty-nine lashes for each offense. Two justices might try one who wilfully broke a street lamp and fine him five pounds for the first offense and ten for the second; if he did not pay the fine within six hours he might be imprisoned for six months (1753, III, 645). Under the same law a negro, Indian or mulatto servant who broke such a lamp might be whipped ten stripes for the first offense and twenty for any later offense. (Compare 1774, V, 301, where the fine was raised to twenty pounds and the trial was transferred to the court of general sessions). By Act of March 15, 1785, c. 33, p. 263, one justice of the peace might try a person accused of larceny provided the treble value of the property stolen did not exceed forty shillings and might sentence the offender to pay a fine of forty

shillings or to be imprisoned for twenty days and to make satisfaction. And by Act of February 28, 1787, c. 16, pp. 579, 586, a justice might fine an innkeeper for keeping gaming implements or permitting dancing or suffering anyone to drink to excess in his house, and if the fine were not paid, might sentence him to a public whipping of fifteen stripes. Several of the above laws were enacted after the state constitution, adopted in 1780, had provided in the Declaration of Rights, Article 12:

> No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.
>
> And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

In New York prior to 1732 there seems to have been no offense punishable by a justice which might not have been atoned by the payment of a fine except that where a servant sold a commodity during the time of his service, two justices might impose either fine or corporal punishment (1665, Colonial Laws of New York, I, 47), and that if a mayor or two justices of the peace decided that a person was a vagrant they might order his or her transportation to place of birth or out of the prov-

ince, and in case of a return order retransportation from constable to constable, with lashings on the bare back by each constable (1721, Same, II, 56). In 1732 there was enacted further legislation (II, 745) which was broadened in 1744 into the provisions that when any person who was charged with any offense under the degree of grand larceny was unable to give bail to appear at the next general sessions, he might be tried and sentenced to corporal punishment, the trial being by three magistrates of the class named if within the city of New York and by three justices of the peace if elsewhere in the colony (1744, III, 377, 379). From 1732 down to the Revolution there is abundant resort to prosecutions for the enforcement of laws relating to fishing, hunting, Indians, hawkers and peddlers, liquor, adulteration of food, with penalties as high as fifty shillings, and, in default, imprisonment for six months at hard labor. Many of these laws provided for imprisonment for three months in default (See 39, Harvard Law Review, 925 et seq). In 1755 the mayor, recorder, or a single justice could fine one convicted of selling liquor to Indians fifty pounds or impose imprisonment, in default, for six months (4 Col. Laws 1096). In 1772 one convicted of selling lotteries could be fined double the amount of the lottery, and if this could not be ascertained, five hundred pounds, or, in default, imprisonment until payment (5 Col. Laws). The constitution of 1777

(Art. XLI) provided that "trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever." Nevertheless an Act of 1785 (c. 40) authorized the mayor, recorder, and aldermen of New York City to commit to the house of correction for not more than six months anyone whom they might theretofore have sentenced to corporal punishment, and to commit any vagrant or prostitute to the house of correction for a similar term; an Act of 1787 (c. 15, Sec. 21) authorized a majority of inspectors at any election to jail for thirty days any person who was guilty of disorderly conduct at any election or used corrupt means to influence any elector; and in 1788 (c. 31) the legislature authorized any justice to commit any disorderly person to the house of correction, at hard labor, for two months or hold him for the next general sessions, which might commit him to the house of correction for six months, with whippings. Such statutes did not deny trial by jury in cases in which it had been used at the time of the adoption of the constitution. A statute similar to that of 1744—by which three justices tried without a jury a man who was accused of petty larceny and was unable to give bail—was sustained in *Murphy* v. *People*, (1824) 2 Cow. 815; see also *Duffy* v. *People*, (1843) 6 Hill, 75, 78. And in *People ex rel. Murray* v. *Justices*, (1878) 74 N. Y. 406, the Court of Appeals sus-

tained a statute under which a defendant charged with assault and battery elected to be tried by such a court, without a jury, was convicted and was sentenced to imprisonment for four months. The statutes, however, did not give the court jurisdiction to try for an offense where a sentence to imprisonment for more than one year might be imposed. *People ex rel. Cosgriff* v. *Craig,* (1909) 195 N. Y. 190.

In Pennsylvania the Body of Laws (1682, Pennsylvania Charters and Laws, 107 et seq.) provided for trial by jury in "criminal matters of life" (p. 117), but it also provided that any servant assaulting or menacing his master or mistress should be punished at the discretion of two justices of the peace, "so it be suitable to the nature of the offense" (p. 113); that for clamorous scolding a justice of the peace should commit the offender to the house of correction for three days (p. 115; see also p. 198), and that profanity and drunkenness should be punished, apparently after hearings before a justice of the peace (see 1683, p. 133), by fines ranging up to ten shillings, or, at the discretion of the justice (p. 121), by imprisonment in the house of correction at hard labor ranging up to ten days (pp. 108, 109, 110). Similar punishments for profanity might be assessed by one justice of the peace under an Act of 1702 (Stat. at L. of Pa., II, c. 44). In 1700 (II, c. 21) it was enacted that "where the fine doth not exceed twenty

shillings one or more justices of the peace * * * may determine and give judgment * * * and may commit the offender to prison as the law shall direct * * * except where the law leaves the fine to the discretion of the county court". An Act of 1766 (VII, c. 534, Sec. 12) empowered any two magistrates in Philadelphia to commit disorderly persons to the workhouse for three months. Section 12 authorized one magistrate to commit a vagabond for three months. An Act of 1767 (VII, c. 552) authorized any justice of the peace of the City of Philadelphia or named adjoining townships, upon due examination and proof, to sentence any disorderly persons or vagabonds without visible means of subsistence to the house of employment to be kept at hard labor for not more than one month. Another Act passed on the same day (VII, c. 555) authorized any justice of the peace outside of Philadelphia and of the townships named to impose a similar punishment upon disorderly persons but allowed an appeal to the court of general quarter sessions in such cases. By an Act of 1771 (VIII, c. 621, Sec. 4) any person who had erected an obstruction to the passage of fish in certain streams could be either fined five pounds or imprisoned for three months. The state constitution of 1776 provided (Declaration of Rights, Sec. 9) "That in all prosecutions for criminal offenses, a man hath a right to * * * a speedy public trial, by an impartial jury of the country,

without the unanimous consent of which jury he cannot be found guilty;" and (Frame of Government, Sec. 25) "Trial shall be by jury as heretofore." By acts of 1777 (IX, cc. 737, 739) all laws which were in force on May 14, 1776, were continued in force, and justices of the peace were given the same powers and jurisdiction as they had theretofore possessed.

In Maryland an Act of 1638/9 (Maryland Archives, I, 53) authorized the Lieutenant General or any one of the council having commission for the peace to hear and determine as any justice of the peace in England might do the following cases in addition to those in which fines were authorized: drunkenness, punishable by whipping or other corporal punishment; fornication and adultery, public whipping or fine; refusal of servant to perform lawful command, whipping or other correcting at the discretion of the justices. This Act also authorized any justice of the peace to imprison any person, until he furnished sureties, who threatened the person or goods of another, or resided among the Indians without the consent of the Lord Proprietary, or who refused to properly care for his servants. The colony naturally punished the misconduct of slaves by inflicting physical pain rather than by fines. The justices were authorized to try and order whippings for any slave who carried a gun off the lands of his master without license from his master (1704, 26 Archives, 261), who stole or

committed any other crime or misdemeanor (1717, 33 Archives, 112), or who harbored other slaves (1748, Maryland Session Laws, 21); while a negro who struck a white man might have one of his ears cropped, (1723, 34 Archives, 732). Any constable might whip, not over thirty-nine lashes, any slave whom he found attending an unlawful meeting, and might do this without proceedings in any court (1723, 34 Archives, 731). Any person, free or slave, who navigated a sloop unlawfully carrying tobacco might be given thirty-nine lashes (1747, Maryland Session Laws, 9; 1753, Session Laws, 2). Persons found in a county other than their own without a pass could be committed by any justice of the peace until they could satisfactorily explain their presence or until they were claimed by their masters, but not longer than six months (1715 Laws of Maryland—Kilty, c. 44). An Act of 1709 provided that persons imprisoned for vagrancy could not be held more than six months (27 Archives, 472). By Acts of 1725, 1747 and 1790 any person who set up a booth and sold liquor within a certain distance of a Quaker meeting house could be committed by a justice of the peace to the public prison of the county until he removed the booth and furnished security for his appearance at the next session of the county court (Laws—Kilty, c. 6; c. 17; c. 15). Within certain named counties, any justice of the peace was authorized to commit rogues, vagrants, vagabonds, beggars and other idle, dis-

solute and disorderly persons, found wandering in the county, to the workhouse for three months at hard labor (1768, c. 29—Laws—Kilty). Similar Acts were passed for other counties subsequently (1773). The Maryland Constitution of 1776 provided in its Declaration of Rights (Sec. 3) "That the inhabitants of Maryland are entitled to the common law of England and the trial by jury according to the course of that law;" (Sec. 19). "That, in all criminal prosecutions, every man hath a right * * * to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty;" and (Sec. 21) "That no free man ought to be * * * deprived of his life, liberty or property but by the judgment of his peers or by the law of the land." And yet the laws of 1780, June session, c. 14, Sec. 77, provided that any free man making a fire in or near a public tobacco warehouse should be fined six hundred pounds of tobacco and any servant or slave so doing should by order of any justice receive on his bare back not more than thirty-nine lashes (see also Sec. 89); by Session Laws, 1785, c. 29, Sec. 5, if any person suffered any servant or slave to kill a wild deer contrary to the act he was to be fined ten pounds, and if any servant or slave killed such wild deer without the knowledge of his master he was to receive not more than thirty-nine lashes at the discretion of the justice of the peace. The laws permitting commitment for three months of vagrants,

vagabonds, etc., (1768, supra,) were extended to other counties, and in 1788 the same power was granted justices of the peace of Caroline County and the period of commitment increased to six months (Laws—Kilty, c. 14).

It may be pertinent to observe at this point that by Act of Congress approved February 27, 1801 (2 Stat. 107), the laws of the State of Maryland were continued in force in the District of Columbia (Sec. 1), and justices of the peace were to "have all the powers vested in, and shall perform all the duties required of, justices * * *, as individual magistrates, by the laws hereinbefore continued in force * * * in said district, * * * in all matters, civil and criminal, and in whatever relates to the conservation of the peace" (Sec. 1).

In North Carolina By-Laws 1770, c. 10, Sec. 2, 23 Rec. at 802, if anyone were convicted before a justice of the peace of hunting with a gun in the night time by fire light, the justice might impose a fine and "order such offender to have and receive thirty-nine lashes, on his bare back, well laid on." By-Laws 1777, c. 21, 24 Rec. 33, if a justice found the accused guilty of night hunting he might require the convict to serve as a continental soldier for three years unless he immediately procured an able-bodied and effective substitute to serve for that term. By-Laws 1778, c. 2, 24 Rec. at 158, anyone convicted before a justice of the peace of being a vagabond might be sentenced to serve in the con-

tinental army, and anyone convicted before two justices of harboring a deserter might be sentenced to serve in the continental army for three years if he were able-bodied; and if he were not sufficiently able-bodied to serve as a soldier he might be fined fifty pounds and sentenced to imprisonment for three months. By-Laws 1780, c. 7, 24 Rec. at 325, if two justices of the peace found that any person supported himself for the most part by gaming, they might require security that he would not bet anything whatever for the term of twelve months. And Laws 1784, c. 34, 24 Rec. 597, punished gaming by imprisonment, involuntary servitude and, where necessary, by thirty-nine lashes on the bare back for each offense. (See also Laws 1764, c. 4, 23 Rec. 611). Several of these laws were enacted after the North Carolina Constitution of 1776 had provided in Article 9 of the Declaration of Rights,

> That no free man shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used.

Volumes 18 and 19 of the Colonial Records of Georgia contain legislation of that colony and state down to 1880 which authorized trial for offenses without jury. (See Georgia Justice of the Peace, title "Conviction"). Such was the Act of February 29, 1764, 18 Rec. 588, for the punishment of vagabonds and other idle and disorderly persons—an act which authorized imprisonment up to three

months or whippings up to one hundred stripes. Such was the Act of February 21, 1785, 19 Rec., pt. 2, at 424, under which any white person guilty of fast driving in Savannah was to be fined without trial by jury and any slave might be given thirty-nine lashes. Without jury trial fines of five pounds might be imposed on those who damage roads (March 7, 1755, 18 Rec. at 95), sold liquor to Indians without licenses (July 23, 1757, 18 Rec. at 223), built wooden chimneys (March 27, 1759, 18 Rec. 313), took any material from fortifications (April 24, 1760, 18 Rec. at 415), sold liquor to slaves without the consent of their owner (Dec. 24, 1768, 19 Rec., pt. 1, at 79), hunted deer at night by fire light (Sept. 29, 1773, 19 Rec., pt. 1, 288), or who, as church warden, failed to inspect slave owners who attended church and prosecute those who came unarmed (Feb. 27, 1770, 19 Rec., pt. 1, 137).

In New Jersey the Vagrancy Acts of 1748, 1754 and 1774 gave a single magistrate power to convict and to commit to prison at hard labor for one month and to punish escape from such commitment with six additional months of hard labor and thirty-nine lashes (Allison, 1775 Laws of N. J.). Scores of infractions of laws concerning the liquor traffic, gambling, hunting and fishing, highways and rivers, and weights and measures were intrusted to justices of the peace. Up to forty shillings, penalties were recovered before a magistrate without jury but with a right to summary review

by the justices in the court of sessions; above forty shillings the defendant could ask for a jury of *six* men, from whose verdict there was no appeal (39 H. L. R. 925 et seq.). The constitution of 1776 provided that "* * * the inestimable right of trial by jury shall remain confirmed as a part of the laws of this colony, without repeal, forever" (Art. XXII). In 1844 the new constitution provided that "trial by jury shall remain inviolate." In *Johnson* v. *Barclay,* 1 Harrison 1, 6, reviewing a conviction by magistrate for swearing, the court said:

> Convictions before a justice, were in practice in this State, long before the court was formed—* * * trial by jury was not introduced as a new mode of trial, in all cases,—it was adopted, or rather continued, as it was then used in England and in this colony, and was not at that time, either there or here, resorted to in cases of summary proceedings and convictions for petty offenses.

Justices of the peace in Colonial Virginia possessed powers similar to those in the other colonies. A single justice could convict a person of gaming, fine him five pounds, or commit him to jail until he furnished security for good behavior for twelve months (18 Geo. II, c. 5, Sec. 3). Any justice could fine one who killed deer out of season fifteen shillings for each deer or commit him to jail in default (8 Geo. II, c. 12, Sec. 1). One who peddled

without a license could be fined twenty shillings by a single justice or, if not paid, order thirty-nine lashes (32 Geo. II, c. 13, Sec. 5). Later this was changed to a fine of five pounds or, in default, thirty-nine lashes (3 Geo. III, c. 14, Sec. 2). Papists who kept arms after refusal to take oath of allegiance were committed for three months, their arms forfeited, together with treble their value (29 Geo. II, c. 4, Sec. 4—1756). The same penalty was imposed for knowing and failing to disclose such keeping of arms (Sec. 5), and for harboring and concealing a horse of such papist (Sec. 9).

Section 8 of the Virginia Declaration of Rights of 1776 provides:

> That in all capital or criminal prosecutions a man hath a right to * * * a speedy trial by an impartial jury of his vicinage without whose unanimous consent he cannot be found guilty * * * that no man ought to be deprived of his liberty except by the law of the land, or the judgment of his peers.

Subsequently, a single justice was empowered to order a vagrant to be bound out to labor for three months (Laws 1787, c. 48), and by Section 18 persons operating gaming tables were treated as vagrants. By Section 14 a vagrant in a town could be committed to the workhouse for three months by two magistrates of the corporation. This Act also enabled a single justice to inflict twenty lashes

on disorderly persons and to imprison them for three months or to bind them out for labor for that time.

A brief review of summary trials at common law may be found in the dissenting opinion of Justice Brandeis, concurred in by Chief Justice Taft and Justice Holmes, in the case of *United States* v. *Morland,* 258 U. S. 433, where it was said (p. 445):

> Confinement at hard labor in a workhouse or house of correction for periods of less than a year was a punishment commonly imposed in America in the colonial period, at the time of the adoption of the Constitution and since, for offenses not deemed serious—that is, for delinquencies as distinguished from serious crimes. Thus by the Great Law of the Province of Pennsylvania of December 7, 1682, the penalty for clamorous scolding, railing or lying was three days' imprisonment in the house of correction at hard labor; for cursing, playing at cards or dice, and for the first offense of drunkenness, it was five. For stage plays, bull baiting and cock fighting, it was at least ten. And for dueling it was three months. The duty to establish such a house "for restraint, correction, labour and punishment" was imposed upon every county of Pennsylvania at the same time. A similar law had been enacted in Plymouth Colony in 1658; in Massachusetts Colony earlier; and like provision was made in other colonies. By the Law of New York of February 9, 1788, c. 31,

> confinement in the house of correction at hard labor was prescribed as the punishment for all disorderly persons. And those "who threaten to run away and leave their wives and children to the city or town" were classed as disorderly persons, with vagrants, beggars, idlers, fortune-tellers and common prostitutes. The period of imprisonment, limited ordinarily to sixty days or until the next general sessions of the peace, could be extended by the general sessions for a further period of six months. In the counties or cities in which there was no workhouse (bridewell) or house of correction, the jails were to be used and considered as such. A single institution often served as almshouse, insane asylum, workhouse, house of correction and jail. *And under all of these laws commitment to the workhouse at hard labor was made by a judge, justice of the peace, or magistrate, without presentment or indictment of a grand jury.* [Italics ours.]

There the Court considered and decided the question of what imprisonment amounts to infamous punishment. Considering the same question in *Ex Parte Wilson,* 114 U. S. 417, this Court observed (p. 427):

> And by the first Judiciary Act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the District Courts to cases "where no other punishment than whipping, not exceeding

> thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted." Act of September 24, 1789, ch. 20, par. 9; 1 Stat. 77.

III

THE DECISIONS OF STATE COURTS, WHERE SIMILAR CONSTITUTIONAL RESTRICTIONS ARE PROVIDED, SUPPORT THE POSITION THAT AN OFFENSE SUCH AS IS HERE INVOLVED MAY BE TRIED BY SUMMARY PROCEDURE

In *Bray* v. *State* (1903), 140 Ala. 172, a defendant was denied a jury in a prosecution for violation of an ordinance which punished failure to pay hack fare. He was convicted and sentenced to six months at hard labor. Trial without jury was sustained.

In *State* v. *Parker* (1924), 87 Fla. 181, an ordinance forbade anyone to operate an automobile while intoxicated, under penalty of imprisonment for not less than thirty nor more than sixty days for the first offense. The defendant was tried by the municipal court without the right to trial by jury. He was found guilty and sentenced to imprisonment for thirty days. Trial without jury was sustained, and the Court said:

> Sec. 3 of the Declaration of Rights in our Constitution, providing that "The right of trial by jury shall be secure to all, and remain inviolate forever," was never intended to *extend* the right of jury trial, but merely

> secures it in the cases *in which it was matter of right before the adoption of the Constitution.* Trials in Municipal Courts for infractions of municipal ordinances were conducted generally without juries prior to the adoption of our Constitution, and, therefore, do not fall within the constitutional guarantee; and offenders against such ordinances are not entitled to a jury trial in such courts. (Citing cases.)

In *State* v. *Glenn* (1880), 54 Md. 572, an habitually disorderly person was tried without a jury and sentenced to six months in the house of correction. In sustaining the conviction, the Court said (p. 600):

> In England, notwithstanding the provision in the Magna Charta of King John, Article 46, and in that of 9 Hen. 3, Ch. 29, which declares that no freeman shall be taken, imprisoned or condemned, "but by lawful judgment of his peers, or by the law of the land", it has been the constant course of legislation in that kingdom, for centuries past, to confer summary jurisdiction upon justices of the peace for the trial and conviction of parties for minor and statutory police offenses; and this jurisdiction has been largely increased and extended in modern times, as will be seen by reference to Burn's Justice, Tit. Conviction; Bacon's Justice Abr., Tit. of the Peace and Paley on Summary Convictions.

The Court (p. 601) quotes with approval from 4 Blackstone Com. 280, as follows:

> Another branch of summary proceedings is that before justices of the peace, in order to inflict divers petty pecuniary mulcts, and *corporal* penalties denounced by Acts of Parliament for many disorderly offenses; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others * * *.

In referring to the approved practice of summary jurisdiction in England, the Court said (p. 602):

> At present, in England, the various offenses falling under the heads of idle, vagrant, and disorderly persons, and made subject to the summary jurisdiction, are defined and classified, and the punishments prescribed by statute, 5, Geo. 4, Ch. 83, as amended by statutes 1 and 2 Vict. Ch. 38; 31 and 32 Vict. Ch. 52, and 32 and 33 Vict. Ch. 99; an analysis of which is given in 2 Broom and Had. Com. 476. The punishment prescribed in those Acts is imprisonment at hard labor. The exercise of summary jurisdiction, therefore, is not, in England at least, regarded as being in violation of the fundamental guarantees of the rights and liberties of the people; and the personal liberty of the subject at this day is as well and jealously protected in England as in any other country, where the principles of

> Magna Charta and of the common law are enforced.

In *Lancaster* v. *State* (1899), 90 Md. 211, a statute authorized police justices to try for assaults without jury. The statute was held valid. The sentence was eighteen months imprisonment. See also *State* v. *Loden,* 117 Md. 373.

In *State* v. *Broms* (1918), 139 Minn. 402, the defendant was prosecuted under an ordinance for disorderly conduct, was convicted and sentenced to hard labor for ninety days. The Court held that he was not entitled to a jury trial. In *State* v. *Anderson* (1925), 165 Minn. 150, the Court decided that one who was accused of selling intoxicating liquor unlawfully in violation of an ordinance was not entitled to trial by jury. In that case the defendant was sentenced to imprisonment for ninety days.

In *Bell* v. *State* (1920), 104 Neb. 203, and *State* v. *Kacin* (1932), 241 N. W. 785, 123 Neb. 64, a State law forbade the possession and transportation of intoxicating liquors. Magistrates and police courts were empowered to try without jury all violations of that act and all violations of ordinances where the penalty did not exceed a fine of one hundred dollars or imprisonment for three months. The statute was sustained, and in *Bell* v. *State* the Court said (p. 205):

> At that time the misdemeanors now under consideration were not recognized by the

common law or by any statute then in existence. New misdemeanors and modes of trial therefor are proper subjects of legislation. The better view seems to be that the legislature acted within its powers in declaring possession and transportation of intoxicating liquors to be misdemeanors, and in providing for the trial of violators of the law before magistrates and police courts without a jury where the penalty does not exceed a fine of $100 or imprisonment for three months. While the decisions of the courts are not in harmony on this question, the conclusion reached is supported by the soundest reason. *Inwood* v. *State,* 42 Ohio St. 186; *Kirkland* v. *State,* 72 Ark. 171; *Van Swartow* v. *Commonwealth,* 24 Penna. Stat. 131; *Tims* v. *State,* 26 Ala. 165; *Commonwealth* v. *Andrews,* 211 Penna. St. 110; *Goddard* v. *State,* 12 Conn. 448; *State* v. *Kennan,* 25 Wash. 621.

In *State* v. *Ruhe* (1898), 24 Nev. 251, in *quo warranto* proceedings the court sustained a statute which provided that trials for the infraction of ordinances of a police nature should be summary in character before the police judge without a jury. By statute the jurisdiction of the police judge included cases in which he might impose fine or imprisonment or both.

In *People* v. *Harding* (1921), 189 N. Y. Supp. 657, it was held that one who is accused of vagrancy is not entitled to trial by jury even though

upon conviction he might be sentenced to three years in a correctional institution or to one year in a jail or penitentiary. The Court said:

> As the evidence offered leaves no doubt as to her guilt, the only question left for consideration is whether or not the demand for a trial by jury was properly denied. As the power to punish vagrants under the Code of Criminal Procedure was greatly enlarged by Chapter 502 of the Laws of 1919, and as it is now possible under Section 891a to impose a sentence, not exceeding three years, to a correctional institution, or to a jail, penitentiary, or other penal institution for a period not to exceed one year, it is urged that, as the punishment now provided is so much more severe than under the old provisions, the former decisions construing this law are no longer applicable, and that the defendant should now be entitled to a jury trial as a matter of right.
>
> The constitutional provision for a jury trial (Article I, Paragraph 2) is: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever * * *."
>
> This section has reference to a trial by a common-law jury of twelve men (*People* v. *Cosmo,* 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967; *People* v. *Justices of Court of Special Sessions,* 74 N. Y. 406) and has been in force since 1777. Courts of Special Sessions have existed since 1744 to the

present time, but no jury was permitted in these courts until 1824, when the *Legislature* provided for a jury of *six* (*People* v. *Justices of Court of Special Sessions,* 74 N. Y. 406), so that any right that a defendant may have to a jury trial in a court of Special Sessions is statutory, and not constitutional, and hence, in the absence of statutory provisions therefor, the defendant is not entitled to a jury trial as a matter of right.

In the case of *Duffy* v. *The People,* 6 Hill's Rep. 75, the Court of Errors of the State of New York passed upon the constitutionality of an Act passed in 1833 punishing a husband or parent who abandoned his wife or children in the State of New York without adequate support. Duffy was convicted by the court without trial by jury. The court, in sustaining the conviction, said (p. 78):

> The Constitution does not require an indictment in all criminal cases; or even for all crimes which are infamous in their character. For the crime of petit larceny, which was always considered as infamous, is expressly excepted from the section of the 7th Article of the Constitution, which requires an indictment for capital offences, and all infamous crimes. Nor does the Constitution require a trial by jury in every case of a criminal nature. The provision of the Constitution on that subject is, that the trial by jury in all cases in which it had been used at the time of the adoption of the new Constitution, should remain inviolate forever.

(Const. Art. 7). A provision substantially in the same form was contained in the former Constitution of this state but the statutes of the colony, previous to the adoption of the old Constitution, and the statutes subsequently thereto, expressly authorized the trial of petit larceny, and offences not infamous in their character, under the degree of grand larceny, without indictment, and without a jury, where the accused neglected to give security to appear at the next Court of General Sessions. (See Colonial Act of 1st Sept. 1744, and 1 Greenl. Laws N. Y. 422; 2 R. L. of 1813, p. 504, 507.) And the first law authorizing a trial by jury in any case, in a Court of Speeial Sessions, for such offences, was passed subsequent to the adoption of the present Constitution.

In Matter of Cooley v. *Wilder,* 234 App. Div. 256, the Court sustained a sentence of six months in jail where trial by jury was not allowed the defendant. See also *People* v. *Stein* (1903), 80 App. Div. 357.

In *Byers and Davis* v. *Commonwealth* (1862), 42 Pa. St. 89, an act authorized the mayor or police magistrate to try a professional thief or pickpocket who frequented designated places for an unlawful purpose and if he were found guilty to commit him to hard labor in the county jail for not more than ninety days. The defendants were tried without a jury, were convicted, and were sentenced to hard labor in jail for ninety days. The act was sustained. See especially pages 94 to 96.

In the case of *State* v. *Rodgers,* Court of Errors and Appeals (1917), 91 N. J. L. 212, the defendant was convicted of operating an automobile while under the influence of intoxicating liquor. His demand for a jury was denied. The sentence was thirty days in jail, but the Act provided penalties of not more than $500 or not less than thirty days nor more than six months. The Court sustained the conviction and held that the offense was not indictable at common law. In *Katz* v. *Eldridge* (1921), 97 N. J. L. 123, the defendant, convicted of violation of the state prohibition law, was denied a trial by jury. The Act provided penalties of not more than $500 or six months or both. This was held to be a petty offense triable without a jury, although the conviction was reversed on other grounds.

In *Wilmarth* v. *King,* 74 N. H. 512; 18 L. R. A. (N. S.) 398 (1908), the defendant was imprisoned for four months, upon conviction by a justice of the peace, for drunkenness. The maximum punishment authorized by statute was six months. By state statute justices of the peace were empowered to hear and determine any prosecution or action of a criminal nature arising within his county where the punishment was by imprisonment not exceeding six months. In sustaining this conviction, the Court said:

> * * * statutes authorizing the punishment of six months' imprisonment by a justice of the peace are to be found, even

> antedating the Constitution. * * * it is impossible to say as a matter of law that imprisonment for six months is more than an equivalent for the barbarous punishment of public whipping and setting in stocks, * * *. The presumption is that the legislature intended to obey the Constitution * * *. This involves a legislative finding that the corporal punishment of deprivation of personal liberty for six months does not exceed the like punishment of whipping or setting in stocks directly inflicted upon the person.

See *Ex Parte Wilson, supra,* where this Court observed a comparison by Congress of thirty lashes and six months imprisonment in establishing the jurisdiction of the District Courts over offenses against the United States.

The case of *Frank* v. *United States* (1911) C. C. A.—6th Circuit, 192 Fed. 864, 868, is the only decision of the Federal Courts petitioner has been able to find bearing upon this subject. There the defendant was tried for violation of the Federal Food and Drug Act, and the Court agreed, upon stipulation of counsel, that since the Act provided for a penalty of $200 only, the violation was a petty offense.

IV

THE LICENSE LAW IS IN THE NATURE OF A MUNICIPAL ORDINANCE AND CONGRESS HAS PROPERLY TREATED A VIOLATION OF THE LAW AS A PETTY OFFENSE

The License Act, approved July 1, 1902 (32 Stat. 622), as amended by the Act approved July 1, 1932,

(47 Stat. 550), was provided for originally in an Appropriation Act for the District of Columbia. Violations of the law are not included as offenses in a criminal statute. It deals simply with local conditions, is designed to provide revenue and to insure the regulation of certain occupations and businesses by local municipal authorities. During the fiscal year 1934 approximately four hundred persons were charged with violations of this Act, and, in 1935, more than three hundred and eighty such violations were charged. In addition, there are many charges of violations of regulations promulgated by the Commissioners of the District of Columbia under authority of the Act. More than seventy forms of businesses, trades, occupations and professions in the District of Columbia are required to be licensed under its provisions. Violations may be punished by a fine not exceeding $300 or by commitment not exceeding ninety days.

For offenses not triable by jury under the Constitution, Congress, by enactment of the Act of March 3, 1925 (43 Stat. 1119), supra, has provided trial by jury where the penalties exceed $300 or ninety days. Where the penalties for such offenses do not exceed $300 or ninety days, summary trial is prescribed. There can be no question that Congress may prescribe summary trial for petty offenses. In *District of Columbia* v. *Colts,* 282 U. S. 63, 72, this Court said:

> That there may be many offenses called "petty offenses" which do not rise to the de-

> gree of *crimes* within the meaning of Article III, and in respect of which Congress may dispense with jury trial, is settled.

One of the decisions cited by the Court in support of this statement is *State* v. *Rodgers,* 91 N. J. L. 212, 214, in which case the State Court sustained a conviction, by a magistrate without a jury, for driving an automobile while under the influence of intoxicating liquor, under a State law which established maximum penalties of $500 or six months for the offense.

In the opinion of the lower Court it appears to be conceded that the offense here is within the class termed "petty offenses", both as to its nature and the punishment which may be imposed.[1] Therefore, in the light of the procedure at common law, it follows that Congress has, by a valid and constitutional enactment, properly characterized a violation of the License Law as a petty offense.

---

[1] The offense with which we are here concerned is the breach of a municipal ordinance. It is an offense which, if known to the common law, was certainly regarded as petty—an offense to which there is not attached any of the elements of moral turpitude. There is, therefore, nothing in the "nature of the offense" by which it may be characterized as a crime. It is of that class of cases described by Mr. Dillon in his work on Municipal Corporations (Vol. 1, Sec. 433), as falling within the description of municipal police regulations and which relate to acts and omissions not embraced in the general criminal legislation of the state. Such acts and omissions were regarded as innocent, or at least as trivial, one hundred and fifty years ago. Obviously, therefore, the doing of business without the payment of a license tax was not a crime within the contemplation of the makers of the

V

THE ABSENCE OF AN ABSOLUTE RIGHT OF APPEAL DOES NOT AFFECT THE RIGHT OF TRIAL BY JURY

The United States Court of Appeals based its decision upon the extent of punishment which may be imposed, laying stress upon the fact that appeal from the Police Court is not a right but exists only by writ of error issuable in the discretion of the Appellate Court (R. 27). The Court concluded (R. 27, 28):

> For these reasons, we are of opinion that the constitutional provisions with relation to jury trial apply, first, in all cases—*especially in all cases where as here there is no election of right and no appeal of right*—in which the offense charged was an indictable offense under the common law, without regard to the measure of punishment; and, second, in all cases, without regard to the nature of the offense, where the punishment which may be inflicted under the statute in-

---

Constitution or the people of the Colonies at the time of the adoption of the Constitution (R. 26).

* * * if the test is whether the punishment which may be imposed is of a kind and nature which could be imposed in summary proceedings at the time of the adoption of the Constitution, the conviction would likewise have to stand; for the most casual examination of the history of the English criminal law from the time of James I to the time of our Revolution—and, as well, the history of criminal procedure in most of the American Colonies—shows unmistakably that summary proceedings, involving even severer punishments than the maximum provided under the statute in question, were not then uncommon (R. 24).

volves a sentence as severe as confinement in jail for ninety days. [Italics supplied.]

This Court has repeatedly held that a review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, is not a necessary element of due process of law (*McKane* v. *Durston,* 153 U. S. 684, 686; *Andrews* v. *Swartz,* 156 U. S. 276; *Murphy* v. *Massachusetts,* 177 U. S. 155). It is presumed that the appellate court will grant a writ of error in a proper case, thus insuring the defendant a review in cases where error is brought to the attention of the appellate court.

In the case of *State* v. *Loden,* 117 Md. 373 (1912), the Court sustained a statute which empowered police magistrates to try without a jury violations of a license law where no right of appeal was provided. See especially pages 385 and 386.

VI

THE OPINION OF THE LOWER COURT IS INCONSISTENT WITH THE DECISIONS OF THIS COURT

In the opinion of the United States Court of Appeals it is conceded that this offense, if known to the common law "was certainly regarded as petty", and that "if the test is whether the punishment which may be imposed is of a kind and nature which could be imposed in summary proceedings at the time of the adoption of the Constitutiton, the conviction would likewise have to stand; for

the most casual examination * * *" of the English and Colonial history of criminal law "* * * shows unmistakably that summary proceedings, involving even severer punishments than the maximum provided under the statute in question, were not then uncommon". But it was said that "time works changes and brings into existence new conditions and purposes;" that "a principle, to be vital, must be capable of wider application than the mischief which gave it birth", and that in construing the provisions of the Constitution with respect to the guaranty of trial by jury "the practice at the time of the adoption of the Constitution is not the only factor to be considered." However, this Court, in *Dimick* v. *Schiedt*, 293 U. S. 475, 487, said:

> It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. *Funk* v. *United States*, 290 U. S. 371. *But here, we are dealing with a constitutional provision* (7th Amend.) *which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791.* To effectuate any change in these

> rules is not to deal with the common law, *qua* common law, but to alter the Constitution. The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Const. Limitations, 8th ed., 124. [Italics ours.]

And in *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 669, it was observed:

> Whether a clause in the Constitution is to be restricted by the rules of the English law as they existed when the Constitution was adopted depends upon the terms or the nature of the particular clause in question. Certainly, these rules have no such restrictive effect in respect of any constitutional grant of governmental power * * *, though they do, at least in some instances, operate restrictively in respect of clauses of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, *the best examples of which, perhaps, are the Sixth and Seventh amendments, which guarantee the right of trial by jury. That guaranty has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England when the Constitution was adopted. Patton* v. *United States*, 281 U. S. 276, 288, and cases cited. See, also, *Callan* v. *Wilson*, 127 U. S. 540, 549; *Dimick* v. *Schiedt*, 293 U. S. 474, 476, 487; *West* v. *Gammon*, 98 Fed. 426.

VII

CONCLUSION

It is, therefore, respectfully submitted that the decision of the United States Court of Appeals for the District of Columbia should be reversed.

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No. 103

In the Supreme Court of the United States

OCTOBER TERM, 1936

DISTRICT OF COLUMBIA, PETITIONER

v.

ETHEL CLAWANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE DISTRICT OF COLUMBIA

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REPLY BRIEF FOR THE DISTRICT OF COLUMBIA

At the conclusion of the argument of this case, November 18, 1936, permission was granted petitioner to file a brief in reply to the points raised in the respondent's brief. These matters were not raised in the petition and objections to the granting of the writ were not filed by the respondent.

I

NO APPEAL FROM THE POLICE COURT TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA HAS EXISTED SINCE 1891

In respondent's brief, at page 8, it was said that in 1925 a right of appeal from the Police Court to the Supreme Court was withdrawn. We submit

this statement is in error. Under the Act of June 17, 1870 (16 Stat. 153), trials were had in the Police Court without a jury, but the defendant was given a right of appeal to the Supreme Court of the District of Columbia, where the case was tried *de novo* before a jury. The Act of March 3, 1891 (26 Stat. 848) accorded a trial by jury in the Police Court where the defendant, by force of the Constitution of the United States, would be entitled to a trial by jury, or where the fine or penalty might be $50 or more or imprisonment for thirty days or more, the only review of the judgment of the Police Court being by writ of error from the Supreme Court of the District of Columbia. By the Act of Congress approved March 2, 1897 (29 Stat. 607), which created the Court of Appeals of the District of Columbia, the review by writ of error was transferred from the Supreme Court of the District to the Court of Appeals. There is nothing in the Act approved March 3, 1925 (43 Stat. 1119), which deals with appeals or writs of error from the Police Court.

II

THE TRIAL OF CASES INVOLVING VIOLATIONS OF THE LICENSE LAW WERE REQUIRED TO BE BY JURY UNDER THE ACT OF MARCH 3, 1891, THE PREDECESSOR OF THE ACT APPROVED MARCH 3, 1925

As pointed out at page 6 of respondent's brief, in the case of *Lasley* v. *District of Columbia,* 14 App. 407 (1899), the trial involving a violation of a License Act was by jury. This, however, was

required under the provisions of the Act of March 3, 1891, which, in effect, prescribed trial by jury in cases where the penalty was $50 or more or thirty days or more. The maximum penalty prescribed in the Act involved in the *Lasley case* carried a penalty of $50 or thirty days.

III

THE RECORD IS SUFFICIENT TO SUSTAIN A JUDGMENT THAT THE RESPONDENT WAS ENGAGED IN THE BUSINESS OF A DEALER IN SECONDHAND PERSONAL PROPERTY

Paragraph 39, Section 7 of the Act approved July 1, 1932 (47 Stat. 550), defines a "secondhand dealer" as follows:

> Every person engaged in the business of buying, selling, trading, exchanging, or dealing in secondhand personal property of any description, including the return or unused portion of any such ticket, order, or token, shall be regarded as a secondhand dealer.

The evidence in this case shows that on Sunday, March 24, 1935, the witness Baxier, an investigator for the Railway Inspection Company, purchased from the defendant the return portion of a railroad excursion ticket to New York City for which he paid her $1.50. He testified that the defendant approached him at Union Station and asked him to buy the ticket. The witness also stated that the defendant took the $1.50 from his hands. He testified that he was instructed to purchase a ticket

from the defendant at Union Station or anywhere else in Washington, D. C. (Rec. 8).

The witness Evelyn R. Simmons, also an investigator for the Railway Inspection Company, testified on behalf of the prosecution that on Sunday, the 7th day of April 1935, she, in company with her husband, Earl R. Simmons, approached the defendant at Union Station and bought from her the return portions of two railroad excursion tickets to New York City for which she paid the defendant $3.00. She further testified that the defendant stated to her that she, the defendant, expected some friends to arrive on the excursion train from New York from whom she could get tickets. The witness also stated that on Sunday, the 28th day of April 1935, she approached the defendant at Union Station, asked for four tickets but was able to purchase only one ticket from her for which she paid $1.50. The witness further testified that whether or not the defendant was at the station she intended to make a purchase of tickets (Rec. p. 9).

The witness Earl R. Simmons corroborated, in substance, the testimony of Evelyn R. Simmons, and testified that defendant stated, on April 7, 1935, that if he would wait until the excursion train arrived he could get a ticket to New York City as she expected several friends on the train. The witness also testified that he intended to purchase tickets from the defendant when he came to Washington whether or not she was at Union Station (Rec. p. 10).

The witness Walter H. Axline, a Lieutenant of the Police for the Baltimore and Ohio Railroad Company testified that on the 28th day of April 1935 he was present at Union Station when tickets were purchased from the defendant by Mr. and Mrs. E. R. Simmons. The witness further testified that the defendant was pointed out to him by Mrs. Simmons (Rec. p. 10).

The witness, Leaburger, a Lieutenant of Police for the Baltimore and Ohio Railroad Company, testified that on the 28th day of April 1935 he was introduced to the defendant by Mrs. Evelyn Simmons and asked her for a ticket to New York. The defendant replied that she did not have any tickets but she would phone someone to see if she could get tickets. He did not purchase a ticket from the defendant on this date (Rec., p. 11).

Testimony adduced on behalf of the defendant was calculated to establish an alibi. The defendant did not testify.

At the close of the Government testimony defendant moved for a directed verdict on the ground that the six purchases alleged to have been made did not constitute a violation of the License Act. Testimony was given in behalf of the defendant to the effect that on Sunday, the 12th day of May 1935, the defendant had come to Washington in response to a request of a gentleman who was confined in a hospital to take him to his home in Bloomfield, New Jersey (Rec. 15). This gentle-

man did not appear as a witness in behalf of defendant and no explanation of his absence was made to the Court.

The defendant exhibited to the witness L. Johnston, a member of the Metropolitan Police Department, summoned by her, six tickets (R. 15) which had been offered in evidence by the Government in support of the charge for the purpose of determining whether he had come in "contact with any of those unused portions * * * among second-hand dealers or pawnbrokers." He testified that he had not (Rec. 16).

Unquestionably, this series of Sunday sales of railroad tickets, together with the statements alleged to have been made by the defendant to the purchasers, indicated to the trial Court the fruition of a design and intention on the part of defendant to engage in the business of selling the unused or return portions of railroad excursion tickets. The Court, obviously and properly, did not believe the testimony offered by the defendant to prove an alibi. Every sale took place on Sunday in Union Station, the most logical place for the transaction of such business. And it is a matter of common knowledge that such excursions are usually operated on Sunday. It is to be noted also that, according to the testimony of witnesses, when the defendant had no tickets she obligingly offered to obtain tickets for sale to them. It is not known whether defendant earns her livelihood from this source alone, but there is no testimony in the record that

the defendant is engaged in any other business or profession.

In the case of *Harris* v. *State*, 50 Ala. 127, 130, the Court observed:

> "Engage or carry on business", as used in Revenue Law, par. 105, declaring it unlawful for any person to engage in or carry on any business for which a license is required, without first obtaining and paying for such license, signifies that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit, and it is not necessary that it should be the sole, exclusive business or occupation; and while the doing of a single act pertaining to a particular business will not be considered as engaging in or carrying on a business, yet, a series of such acts would be so considered.

In the case of *Fox* v. *Smith*, 108 N. Y. S. 181, 182; 123 App. Div. 369, the Court held that one engagement to watch the movements of a husband and report to the wife for a fee was sufficient to sustain a charge against the defendant of engaging in the business of a private detective for hire, although he was not regularly engaged in the business.

Here the defendant did not deny the offense, although witnesses testified in her behalf to establish an alibi. It is submitted that the acts of the defendant were clearly within the prohibition of the License Statute and that the evidence was sufficient upon which to base a conviction of engaging in the business of a secondhand dealer without a license.

IV

THE RESPONDENT'S RIGHTS ON CROSS-EXAMINATION OF THE PROSECUTING WITNESSES WERE NOT PREJUDICIALLY CURTAILED

Even a casual reading of the cross examination of the Government witnesses attempted by the defendant and precluded by the Court shows clearly that the questions were frivolous, immaterial, and irrelevant. One or two instances will serve to illustrate the truth of this statement. Whether the witness Baxier "wanted the Court to believe that the defendant, a white person, approached the witness and asked him to buy a ticket, when there were at least three thousand people in the station", was wholly immaterial. He had already so testified under oath on direct examination, and obviously expected the Court to believe his testimony. There was no material objective in inquiring whether the witness knew defendant was about to sue the Pennsylvania Railroad or whether the officers of the Railroad had unsuccessfully attempted to settle with the defendant. Counsel for the defendant relies upon the decision in *Alford* v. *United States,* 282 U. S. 687. The facts in the *Alford* case are not remotely similar to the present. The Court, however, laid down the broad fundamental rule, peculiarly applicable here, that:

> The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial

court. It may exercise a reasonable judgment in determining when the subject is exhausted. *Storm* v. *United States,* 94 U. S. 76, 85; *Rea* v. *Missouri,* 17 Wall. 532, 542–543; *Blitz* v. *United States,* 153 U. S. 308, 312.

The record (pp. 8–18) shows that practically all of the information desired by the respondent on cross-examination was, during the course of the trial, brought out in the testimony of the various witnesses. Furthermore, an examination of the whole record discloses that the respondent was given a fair trial.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 103.

DISTRICT OF COLUMBIA,

Petitioner,

vs.

ETHEL CLAWANS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 103.

DISTRICT OF COLUMBIA,

Petitioner,

vs.

ETHEL CLAWANS,

Respondent.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion below appears on page 23 of the record, and has been officially reported in 84 Fed. (2nd) 265.

Jurisdiction.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended.

Summary of Argument.

1. The defendant was entitled to a jury trial under Article 3, Section 2, Clause 3 and the 6th Amendment of the U. S. Constitution and the Common Law cannot be invoked to sustain the conviction.

2. The proof of the purchase of the unused portion of three railroad tickets, solicited by the purchasers from the defendant on March 24th, April 7th and April 28th, 1935, in the Union Station at Washington, D. C., with no other proof of defendant's occupation or business did not constitute engaging in the business of the second-hand dealer under the code of the District of Columbia.

3. The rights of defendant were prejudicially impaired by the rulings of the trial court on cross examination of the prosecuting witnesses.

4. The defendant, under the record, was not given a fair trial.

5. The trial court should have sent the case to another Judge after defendant filed an affidavit of prejudice.

Statement.

Defendant is a young woman residing at Newark, New Jersey (R., 26). She was arrested on Sunday, May 12th, 1935, under a warrant issued upon the filing of an information in the Police Court of the District of Columbia, charging the defendant with conducting the business of a second-hand dealer in personal property, without license (R., 25).

Thereafter, the defendant duly entered the following proceedings:

1. She appeared specially and moved to quash the service of summons because it was executed on Sunday in violation of Section 372, Title 24 of the D. C. Code (R., 5). This motion was denied and exception noted.

2. She filed an affidavit of prejudice against Judge Schuldt, based upon circumstances arising out of a prior case against the defendant, in which Schuldt presided (R., 8). This application for change of judge was likewise denied and exception noted.

3. She applied for a bill of particulars in view of the very general specifications of the information (R., 3). This was also denied and exception taken.

4. She demanded a jury trial, which the judge denied (R., 19) and exception taken.

Trial thereupon being had, defendant was found guilty and sentenced to $300.00 fine or sixty days in jail (R., 33).

Defendant thereupon moved for a new trial upon assigned errors, which motion was denied (R., 10, 40-3).

Thereupon defendant applied to the Court of Appeals for a writ of error, which was granted (R., 49), and in the Court of Appeals the following propositions were among those urged as the basis of reversal of the judgment of conviction:

1. That the defendant was entitled to a jury trial.

2. That the record was insufficient to show that the defendant was carrying on the business of a second-hand dealer.

3. That defendant's rights were prejudicially affected by curtailment of cross examination of the prosecution witnesses.

4. That defendant, under all of the record, had not been given a fair trial.

The Court of Appeals sustained defendant's point as to the right of jury trial, but, without discussion, denied the other contentions of the defendant.

All of the points urged below on behalf of the defendant are again asserted in support of the decision of the Court of Appeals which set aside the judgment of conviction, in the trial court.

The particular record facts under each point, will be noted in the following argument:

Argument.

The petition and brief on certiorari presents the jury question alone. Respondent, while asserting that the defendant was entitled to a trial by jury, and that the decision of the Court of Appeals on that point was right, does not desire to rest her case on this point alone, but urges other specific contentions which were also presented to the Court of Appeals.

It is our understanding of the rule, that this court in reviewing the proceedings below, may consider all contentions of *respondent* duly presented below, even though the petition for certiorari is based on a single proposition, as such additional contentions are for the purpose of *sustaining* the judgment of the Court of Appeals.

Respondent's attack below was on the judgment of conviction. The contentions below were all directed to that end. If any of defendant's contentions were sound, the decision of the Court of Appeals should stand and the trial judgment should be reversed.

It, therefore, follows that a reversal on the *jury* question alone would not suffice in this court, if the record plainly discloses that the conviction cannot stand by rea-

son of other distinct contentions duly presented to the Court of Appeals. Thus, the Court should consider *all contentions* made by respondent below (Judicial Code, Secs. 240 and 269).

The following cases support this rule:

Sun Office v. Scott, 284 U. S. 177, 182;
Story Co. v. Paterson Co., 282 U. S. 555, 560;
Cole v. Ralph, 252 U. S. 286;
Camp v. Gress, 250 U. S. 308, 318;
Watts Co. v. Union, etc., 248 U. S. 9, 21;
Denver v. Trust Company, 229 U. S. 123;
Panama Co. v. Napier Co., 166 U. S. 280.

I.

Defendant was entitled to a jury trial.

Little can be added to the comprehensive opinion below. As the opinion points out, many summary trials and conviction were permitted at common law (Harvard Law Review, June, 1926). But, it is to be observed, each such summary punishment depended on a special law.

Paley on Summary Convictions, 46, Sect. 7;
Blackstone, 4, Chap. 20, page 280.

The numerous statutes cited by petitioner (pp. 11-43) show that a special act was necessary to authorize administration of summary punishment even at common law.

Petitioner contends (pp. 7-10) that if an offense was subject to summary punishment at common law, it necessarily must still be classified as a petty offense, regardless of any recent increase in the imposed penalty.

License violations do not appear to have been contemplated under the common law, so apparently there was no common law rule with respect to cases analogous to the

one at bar; and as pointed out above, in the absence of a specific statute, power to impose summary punishment would not exist.

It is interesting to observe that in many state courts, today, jury trials are now being granted in prosecutions for violations of analogous license statutes.

State v. Checkver, 96 Atl. 202 (Del.) (Junk Dealer);
State v. Goldenberg, 108 Atl. 137 (Del.) (Junk Dealer);
Commonwealth v. Hood, 66 N. E. 722 (Mass.) (Second-hand Articles);
Commonwealth v. Hubley, 51 N. E. 448 (Mass.) (Junk Dealer);
Commonwealth v. Wermouth, 54 N. E. 448 (Mass.) (Dog License);
Graham v. State, 13 So. 883 (Miss.) (Pawnbroker);
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Morgan Co. v. Commonwealth, 109 S. W. 907 (Ky.) (Sewing Machines);
State v. Steward, 116 N. W. 693 (Ia.) (Sale of Medicine);
Launder v. City, 111 Ill. 291 (Pawnbroker);
State v. Cohen, 84 N. C. 771 (Attorney's license);
Lasley v. District of Columbia, 14 App. D. C. 407.

It is asserted that license prosecutions are usually accorded regular criminal procedure.

37 Corpus Juris 264 (55), 269 (163).

Ever since the decision of this court in the Schick case (195 U. S. 65) it has been plain that either the *nature* of

an offense or the *prescribed punishment* might determine the right to a trial by a jury. It is thus reasonable to conclude that even with respect to an offense denominated as petty under the common law and which was subject to summary punishment at common law, if, in more modern times, the punishment shall have been increased from a *petty* degree to a *substantial* degree, the rule of summary punishment at common law would no longer apply. The offense would, because of the severity of the punishment, be entitled to a classification as a criminal offense, and therefore come within the constitutional provision granting the right to a jury trial.

Thus counsel for the District of Columbia in the case of Colts v. The District of Columbia (232 U. S. 63) in discussing the decision of this court in Callan v. Wilson (127 U. S. 540), argued (p. 65):

> "Certainly, if offenses which were once petty are to be punished severely, a trial by jury must be allowed; and it must be equally true that, if Congress decided that an offense shall be given a petty punishment, persons who are accused of such facts may be tried as for petty offenses. As said in People v. Craig, 195 N. Y. 190—'It is not the mere name of a crime but the punishment therefor that characterizes it.' "

This expression from the legal representative of the District in the Colts case, is pertinent to the history of the instant license statute.

In 1871, a licensing act* was passed by the District Assembly, which fixed the penalty for violation at a fine of *not less than $5.00 or more than $50.00, without imprisonment.* It is interesting to note that in a prosecution under this original act, a jury trial was permitted.

Lasley v. District, 14 App. D. C. 407.

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*Act of Legislative Assembly, August 23, 1871, as amended by Act of Congress of March 2, 1891, Chapter 521, 26 Stat. 841.

Later, in 1902, by amendment,* the offense was made punishable by not to exceed $500.00 fine *and thirty days in jail,* in default of payment. At this period, the defendant was entitled to appeal, and secure a jury trial in the Supreme Court of the District (Sections 1073-7, 773, R. S., Dist. of Col.). It was not until 1925, that right of appeal was withdrawn, and right of trial by jury was likewise limited to cases involving punishment in excess of 90 days' imprisonment and $300.00 fine.

Thus, by the last amendment to the statute in 1932,** under which defendant is being prosecuted (Pet.'s Brief, p. 8) an existing penalty of not more than $300.00 fine or *not more than ninety days in jail,* is provided. In view of the constant increase in severity of sentence covering this offense, may we not agree with District counsel in the Colt case, "If offenses which were once petty, are to be punished severely, a trial by jury must be allowed."

Thus, when the Schick case was decided (195 U. S. 65) (1903) this court pointed out that the applicable statute then in force in the District concerning jury trials, fixed the punishment in summary convictions at not more than $50.00 fine and not more than thirty days in jail (Sect. 44). This limit, petitioner now urges, may lawfully be raised to $300.00 fine and three months in jail, and still be denominated as a "petty" punishment!

Before the Court of Appeals, in the case at bar, counsel for the District asserted (p. 5, C. A. brief) that:

> "• • • there can be no question that the charge of operating a business without a license is a misdemeanor in the District of Columbia, and is, therefore, a criminal offense."

---

*Section 906, Title 20, District Code, 32 Stat. 628, 39 Stat. 1046.

**Act of July 1, 1932, 47 Stat. 550.

This position is in harmony with the position taken by the District in the Colt case (supra), and is difficult to reconcile with the claim now made that the offense and its punishment, is trivial and petty.

The state court citations noted by petitioner (pp. 34, 43) may be compared with other state citations defining the character of "trivial" matters.

Ragsdale v. City, 82 S. E. 77, Va.;
Holly v. City, 57 S. W. 491, Ky.;
State v. Lieberman, 26 Neb. 464;
Natal v. Louisiana, 139 U. S. 621.

Or indeed, such cases may be compared with other state decisions holding trial by jury necessary in all cases where *any imprisonment* is provided.

Simmons v. State, 75 Ohio St. 346;
City v. Keating, 118 N. E. 114 (Ohio);
1 Dillon Mun. Corp., 411, 433;
Ex parte Johnson, 161 Pac. 1097 (Okl.).

State cases may be found, permitting summary convictions without a jury, where appeals afford a later jury trial.

State v. Lytle, 51 S. E. 66, N. C.

But this method of providing jury trial by appeal does not seem in harmony with the decision of this court, and no such jury trial, on appeal, has been available here, since the 1925 amendment.

Callon v. Wilson, 127 U. S. 540.

In summary, we think it fair to state that the various state decisions seem quite irreconcilable, and not unnaturally so, since jury provisions in the various state con-

stitutions differ widely. But these cases do, generally, establish the following conclusions:

(a) That summary punishment at common law usually depended on a specific statute.

(b) That the punishment usually viewed as "trivial" are not comparable in severity with the punishment here involved.

(c) That severity of sentence is a controlling feature in determining right to a jury trial.

(d) That the severity of sentence for the instant offense has been increased from $50.00 fine, *without imprisonment*, to $300.00 fine, *with ninety days imprisonment;* since the Schick case.

(e) That in license cases in the state courts, jury trials are commonly afforded.

The Court of Appeals concluded that two criterions existed to aid the court in determining the mooted question:

1. Was the offense subject to jury trial at common law? If so, a right to jury trial now exists regardless of existing class of offense, or penalty imposed.

2. Is the provided punishment so severe that such punishment cannot be considered as either petty or trivial, and, therefore, prevents the offense from being considered petty or trivial in determining the right to jury trial? If so, regardless of the practice at common law, or the nature of the offense, a jury trial should be afforded.

This analysis is, we think, in accord with the language of this court in the Schick case (195 U. S. 65).

Thus the Court of Appeals gave weight to the fact that no right of appeal from the District Police Court exists, a fact which petitioner insists is immaterial. It is true that appeals are statutory, but is not the Court of Appeals justified when considering the question of severity,—which the District itself recognized in the Colt case was important—in considering also the finality of the sentence? The real aim should be to afford a fair trial before imposing imprisonment, with consequent loss of liberty and good name. If the imprisonment is substantial, and not trivial, *final* summary judgment by a judge is difficult to harmonize with the spirit of the Federal Constitutional provisions. The danger, and therefore the seriousness, of the situation, seems intensified by the absence of any right of appeal.

The argument of petitioner under Point II and the voluminous collections of ancient laws and decisions from before the Magna Charter, is put forth because of the provision in Section 44 of the Code of the District of Columbia, 1901 (31 Stat. 1189), as amended by the Act of Congress approved March 3, 1925 (43 Stat. 1119) which reads:

> "In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial shall be by jury * * *".

It is argued from these ancient cases, that the defendant "*would not by force of the Constitution, be entitled to a trial by jury*".

The argument is, if we understand it, that if it were the practice prior to the adoption of the Constitution, either under Acts of Parliament the Common Law or Colonial

Statutes, to summarily try without a jury certain criminal offenses, that this power is still retained under the aforesaid Act of Congress. But the vice of this argument is that Congress did not have the power to extend the clear limitations of the Constitution by any such assumed interpretation of its meaning.

It was not the intent of the framers of the Constitution to empower Congress to resurrect and enact in direct violation of its terms, all of the ancient statutes of England and the Colonies which they had not written into the Constitution. The petitioner's contention in this respect is completely destroyed by the long list of decisions from Ex Parte Bollman, 4th Cranch. 75, and authorities herein cited down to date; that there was no common law criminal offense existing in the Federal Courts. The Federal Courts having jurisdiction in criminal matters only by statutory authority.

No decision can be found that Congress had the power to grant to the Police Courts of the District of Columbia a greater power over the lives and liberties of the citizens, than was possessed by the Police Courts of other states.

Prior to the amendment of the Code of the District of Columbia in 1925, it was provided by Sections 1073, 1074, 1075, 1077 and Section 773 of the Revised Statutes of the District of Columbia, that a right of appeal to the Supreme Court and a trial by jury de novo, as though the case had originated there, was allowed, but when this provision was repealed and the Police Courts were vested by the amendment of 1925 with absolute power to try without a jury a case involving a prison sentence and a large fine, and where no election of the right to try by jury and no appeal allowed from its decision, the Constitutional guarantee of the citizen of a trial by jury under the Constitution, was taken from him. Even the right of appeal to the Supreme Court, and a trial de novo was held not to satisfy the guarantee of the right of trial in the first instance, as provided in the Constitution.

Charles A. Dana, the publisher was arrested in New York City upon a warrant from the Police Court of the District of Columbia, charging him with having published a criminal libel. He sued out a writ of habeas corpus in the Southern District of the State of New York where Mr. Justice Blatchford discharged him from arrest upon the ground that "if brought to this district he would be tried in a manner forbidden by the Constitution", namely, by a Police Court without a jury, although he would then have had the right of appeal and trial de novo in the Supreme Court. See re: Charles A. Dana, 7 Benedict 14; Callan v. Wilson, 127 U. S. 540, where the conviction was reversed and the prisoner discharged because he had not had a jury trial.

A quotation from the opinion in the Callan case on page 9 of respondent's brief, is misleading as to what was decided. The petitioner would have the Court infer that in the Callan v. Wilson case, the court conceded that there was a class of "petty" or minor offenses not usually embraced in criminal statutes, which if committed in this district, "may under the authority of Congress, be tried by the Court and without a jury". There was no such concession whatever by the Court as is stated in petitioner's brief. The true meaning of the Court was in the sense as if the Court had said, "Conceding for the sake of argument that there was a class of petty or minor offenses which may, under the act of Congress be tried in the District of Columbia without a jury, this case (Callan v. Wilson) is not one of them". However, even though the court had made such a concession plain and evident in its opinion it would have been mere obiter dicta as that question was not before the court. The only issue involved was the right of a defendant to *waive* a jury in a criminal prosecution.

The arbitrary and final powers vested in the Police justices of the District of Columbia which exist nowhere else in the United States of America or its Colonial possessions

where the Constitution is in force, was the controlling point in Judge Groner's able decision, wherein he said:

> "And in considering the question as applied solely to the District of Columbia, it is not amiss to refer to the fact that under the present statute there is not only a denial of a jury trial, but there is no appeal of right to any Supreme Court. The decision of the Magistrate is final unless upon application to this Court we elect to exercise the power of review; and if we do we are by rule confined to questions of law and may not weigh the evidence. In most of the states, the mechanics of the law provide either the right of election or the power of the accused to be held over for a trial in a court, with a jury, or an appeal of right to a higher court to review the judgment of the Magistrate. The omission of either provision cannot be and should not be lightly overlooked."

In his decision Judge Groner further said:

> "Laying aside the imposition of a fine of $300, the right to imprisonment for three months involves a proposition of real seriousness to inflict upon the accused summarily imprisonment in a common jail for that length of time, and at the same time, to deny him of right of an appeal to the court of record is a matter which cannot be whistled down the wind with the statement that court business must go on * * * that dockets must be cleared * * * or that the requirements of jury service should not be expanded to the loss of the citizen in his private affairs."

In this connection on page 44 of the respondent's brief, it is stated:

> "During the fiscal year 1934, approximately 400 persons were charged with the violation of this act, and in 1935 more than 380 such violations were charged."

By reason of which an appeal is made that this constitutional guarantee to the citizen of a jury trial, should be denied, that the Police Court may dispose of its business unhampered by any such antiquated guarantees of a jury trial found in the Constitution.

We submit that no policy of convenience should be permitted to prevail that would ultimately destroy the safeguards of liberty under the Constitution. Such a policy has frequently been commented upon and discouraged by this court (See Dimick v. Schiedt, 293 U. S. 486).

It is most probable that the exercise of this unusual and unauthorized power by the Police Court of the District of Columbia, has resulted in the volume of business of 1934 and 1935 of which the petitioner informs the Court, for it is a known historical fact, that it is a weakness of human nature to abuse and to extend the powers granted them, and that is particularly true of Justices of the Peace, of Police Magistrates and other similar officers of the law.

It was the knowledge of this prone weakness of human nature, and the abuse of power, that caused the framers of the Constitution to write into it the bill of rights which this court has steadfastly and zealously guarded and upheld, to the everlasting gratitude of a free people. When this act was originally adopted a fine of $50.00 was provided and imprisonment not to exceed thirty days. Thereafter, Congress increased the fine of $300 and imprisonment not to exceed three months.

Who can say that the next Congress may not see fit to increase this fine to $1,000 and the imprisonment to one year, or that a succeeding Congress will not still further increase the fine and the imprisonment, or that the Police Magistrates may not be vested to summarily dispose of all offenses enumerated on petitioner's brief, pages 11-34, unless Congress is restrained by the Constitutional guarantee which we invoke in behalf of this respondent.

Blackstone, 4, Chapter 27, page 350, wrote as follows:

"And, however convenient these may appear at first (as doubtless all arbitrary powers well executed, are the most convenient), yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in matters of the most momentous concern".

How prophetic are these words in view of the increase of power that Congress has conferred on the Police Court of the District of Columbia in the present amendment granting such final extensive and arbitrary powers to said Police Court of District of Columbia without the right of an appeal to an accused.

It should also be observed that in all the cases cited under Point II of petitioner's brief the punishment for the crime was pursuant to a statute deriving its authority from the Constitution of the various state or some higher organic law and that in most all of those cases the right of an appeal was allowed. As the offense here charged was unknown to the Common Law and as there is no Common Law in the Federal Courts, we must look to the authority for the prosecution in some statute.

As the Act of Congress *defines* the offense, fixes the punishment, and designates the police judge of District of Columbia to try the accused, it would seem that the argument of petitioner's brief, Point II, with respect to the powers of Justices of peace, police courts, other minor judicial officers, becomes purely academic and calls for no extended review.

However, we think the remarks of Judge Chase in U. S. v. Morrall, 2 Dallas 395 are as appropriate here as when these words were written many years ago:

"But the question recurs when and how have the courts of United States acquired a common law jurisdiction in criminal cases? The United States must possess the common law themselves, before they can commit it to their judicial agents. Now the United States did not bring it with them from England. The Constitution did not create it, and no act of Congress has assumed it. Besides what is the common law we are referred? Is it the common law entire as it exists in England or modified as it exists in some of the States; and of the various modifications, which are we to select, the system of Georgia or New Hampshire or Pennsylvania or Connecticut?"

Constitutional Law of United States; Willoughby, Volume 2, page 1319, Secs. 841-842;
Keller v. U. S., 213 U. S. 138, and authorities cited, page 145;
Cooley's Constitutional Limitations 574;
Wheaton v. Peters, 8 Pet. 591;
U. S. v. Britton, 108 U. S. 199;
U. S. v. Hudson, 7 Cranch. 32;
Tennessee v. Davis, 100 U. S. 257;
Smith v. Alabama, 124 U. S. 465;
Peters v. U. S., 94 Fed. Rep. 127, in which the Court said:

"It must be borne in mind that national courts do not resort to common law as the source of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon Congress to define what are crimes, to fix the punishment, and to confer the jurisdiction for trial. U. S. v. Walsh, 5 Dill. 60; U. S. v. Martin, 4 Cliff. 156; In re Greene, 52 Fed. 104; Swift v. Railroad Co., 64 Fed. 59; U. S. v. Hudson, 7 Cranch. 32; U. S. v. Coolidge,

1 Wheat. 415; U. S. v. Britton, 108 U. S. 199; U. S. v. Eaton, 144 U. S. 687; Manchester v. Mass, 139 U. S. 240, and cases cited on page 263; Butler v. Boston Steamship Co., 130 U. S. 527; Jones v. U. S., 137 U. S. 202, at page 211; U. S. v. Dietrich, 126 Fed. 676; Byrne Federal Criminal Procedure (Section 1), citing under the text Ex parte Fiske, 113 U. S. 713; Jones v. U. S., 162 Fed. 417, and many other cases."

It has been impossible to review all of these cases and it will not be undertaken but referring to People Ex Rel. Murray v. Justices (1878), 74 N. Y. 406; People Ex Rel. Cosgriff v. Craig, 1903, 195 N. Y. 190, and other cases there cited to the effect that the Special Sessions of the City of New York and Magistrates' Court exercised jurisdiction over minor crimes without the intervention of a jury, it is only necessary to say it is well known that until New York adopted a Constitutional Amendment, Section 23, Article 6, of its Constitution of 1869 and again 1879, vested this Court with such jurisdiction, any one accused of crime had the right of election to be tried in the Court of General Sessions upon an indictment before a jury and in cases where a person was accused of selling less than 5 gallons of intoxicating liquors without having a license, and where the fine was only $10 and did not exceed $50.00 could not be tried in a court of Special Sessions but was entitled to be tried before a common law jury.

Hill v. People, 20 N. Y. ;
Bahan v. People, 17 N. Y. 516;
The People v. Stevens, 13 Wend. 341;
The People v. Brown, 16 Wend. 561;
Wyndehamer v. People, 13 N. Y. 378;
People Ex Rel. Camaford v. Dutcher, 83 N. Y. 240.

Whatever may have been the practice prior to the adoption of the New York Constitution as indicated on pages

19, 20, 21 and 22 of petitioner's brief with respect to the punishment of minor offenses it is certain that after the adoption of the Constitution of the State of New York and until this Constitution was amended in 1869 and again in 1879 a Court of Special Sessions was not authorized to try misdemeanors without a jury provided the accused elected to be tried by a common law jury; and the very fact that such an amendment was necessary is a forcible argument that there was a tendency not only in the State of New York but in other states to preserve this right to trial by jury and to curtail in a large measure the powers formally exercised by Justices of the Peace and Minor Courts before the Constitution.

Upon the respondent's brief at the bottom of page 7, the petitioner quotes one sentence from the opinion in the Schick case, and on page 8 of this brief takes part of a sentence of the opinion commencing with the word "when" and ending with the word "offenses", to support his argument that the substitution of *"criminal prosecutions"* in the Sixth Amendment for *"Crimes"* in Article 3 of the Constitution, indicated a clear intent to exclude smaller offenses from the Constitutional protection. In fact it is so asserted on petitioner's brief, but this court has said directly to the contrary in its decision in Patton, et al., v. U. S. This Court said, at page 298, in its opinion in that case after quoting the Sixth Amendment:

> "This provision which deals with trials by jury clearly in terms of *privilege*, although occurring later than that in respect to jury trials, contained in the original constitution, is not to be regarded as *modifying or altering* the earlier provision; and there is no reason for thinking such was within its purpose. The first ten amendments of the original constitution were substantially contemporaneous and should be construed in pari materia. So construed, the latter provision clearly may be regarded as reflecting the

meaning of the former. In other words, the two provisions mean substantially the same thing and this is effect of the holding of this Court in Callan v. Wilson, 127 U. S. 540, 549, where it is said 'and we do not think that the amendment was intended to supplant that part of the Third Article which relates to trial by jury; *there is no necessary conflict between them.*'" (Italics ours.)

In the Schick case, Mr. Justice Harlan in his very able dissenting opinion stated that the question of the right to waive a constitutional guarantee was "applicable alike in cases of felonies and misdemeanors". This Court said while it adopted as sound the reasoning of Mr. Justice Harlan, "we are unable to find in the decision any convincing ground for holding that waiver is effective in misdemeanor cases but not effective in the case of felonies". The Court in the Patton case decided clearly.

(1) The right of a jury trial was a privilege which the accused may waive.

(2) There was no real distinction in the application of this right as between misdemeanors or felonies.

(3) By Section 24 of the U. S. Judicial Code, Title 28, Section 41, the District Court was vested with full power to try all crimes cognizable under the authorities of U. S. That a jury was not a necessary or an integral part of the Court. "In the absence of a valid consent the District Court cannot proceed except with a jury, not because a jury is necessary to its jurisdiction, but because the accused is entitled to the terms of the Constitution to that mode of trial. Since, however, the right to a jury trial may be waived it will be unreasonable to leave the Court powerless to give effect to the

> waiver and itself dispose of the case. * * * The power of the waiver being established this is the clear import of the decision of this Court in Schick v. U. S., 195 U. S. 65, 71." From the opinion prior to this decision and particularly in Low v. U. S., 169 Fed. 86 and Dickinson v. U. S., 159 Fed. 801 and Schick v. U. S., 195 U. S. 65, and in many of other cases the Courts have held that the presence of a jury constituted and was an integral and constitutional part of the Court, and for that reason was a constitutional right which could not be waived in felony cases.
>
> Patton v. U. S., supra, reversed this holding and held that under the Judicial Code, supra, it was the Court which was vested with power to try and the right of a jury was a mere privilege to the accused which he might waive.

In this connection it seems unreasonable that Congress would empower a police magistrate to try a crime without a jury yet withhold this right from a U. S. District Court unless the accused waived such right to a jury.

II.

Is the record sufficient to sustain a judgment that the defendant was "engaged in the business of dealer in second-hand personal property"?

The information (R., 1) charges that the defendant "engaged in the *business* of dealer in second-hand personal property on the twenty-fourth day of March, 1935, in the District of Columbia, and divers other days and times between that date and the date of the filing of this information (May 13, 1935).

The only offense defined in the District statute is "engaging in the business" of dealing in second-hand property. It is no offense to sell a railroad ticket under this statute, and it follows that it would be no offense, per se, to sell more than one railroad ticket either at one time or at different times. To be guilty under this statute, the defendant must be *engaged in the business* of selling such tickets. Petitioner states this Act is a reveune measure:

> "But a single Act cannot be taxed as a privilege; only a business may be taxed."
>
> Trentham v. Moore, 111 Tenn. 346;
> Comm. v. Hayes, 107 Ky. 655.

The Courts have defined the meaning of such statutes. "The term 'business' • • • means that employment which occupies the time, attention and labor of the person so engaged, for the purpose of a livelihood or of profit. • • • The ordinance has reference to regular and legal employment, not employment that is occasional, irregular or illegal."

> Braxton v. City, 79 So. 150, Ala.;
> Martin v. State, 59 Ala. 34;
> Merritt v. State, 19 Tex. App. 435;
> U. S. v. Kenton, 26 Fed. Cas. 763 (15526);
> Florsheim Bros. v. Lester, 60 Ark. 120;
> Steam Heating Co. v. Company, 60 Mo. App. 148;
> Gates v. Cohen, 7 Calif. App. 341;
> Babbitt v. Field, 52 Pac. 775, Ariz.;
> Ammons v. Company, 141 Fed. 570;
> Gilcrist v. Company, 47 Fed. 593;
> People v. Silver, 158 App. Div. 217;
> People v. Deudehauser, 130 App. Div. 760; 195 N. Y. 554.

In support of this information, the prosecution offered the following testimony:

(1) The witness Baxier testified:

> "he purchased a return ticket to New York City for $1.50 from the defendant at 8:28 A. M., May 24, 1934" (R., 19).

(2) The witnesses Mrs. Evelyn Simmons and her husband Earl R. Simmons, testified:

> "On April 7, 1935, she and her husband approached defendant and bought two tickets to New York City; that defendant told her she expected some friends to come off the excursion train and that she would let her have the tickets; witness paid $3.00" (R., 20).

Mr. Simmons testified:

> "He was present when his wife made a purchase of return excursion tickets at Washington, D. C., but did not see the money pass on the seventh of April, 1935, though he was with her at the time of the alleged purchase. Defendant told him that, if he waited until the excursion train arrived, he could get a ticket to New York City; that she expected several friends off the train."

(3) The same witnesses, Mr. and Mrs. Simmons, together with the witnesses Axline and Leaburger, testified as follows:

Mrs. Simmons:

> "On the twenty-eighth of April, 1935, she approached the defendant at 2:55 P. M. for tickets, but was only able to get one ticket, for which she paid $1.50. Witness came over to the defendant at 2:55 P. M., put her arms around the defendant so that defendant would not be suspicious, in order to get the ticket" (R., 20).

Mr. Simmons:

> "On the twenty-eighth of April, 1935, he was unable to get four return tickets, although witness approached the defendant to secure the same, but that his wife succeeded in getting one from the defendant" (R., 21).

Witness Axline testified:

> "On April 28, 1935, he was present at the Union Station, Washington, D. C., when a purchase was made by Mr. and Mrs. E. R. Simmons, but that he did not see the money pass, but heard the defendant say she only had one ticket and let a cripple man have it" (R., 23).

Witness Leaburger testified:

> "On the twenty-eighth day of April, 1935, Mrs. Evelyn Simmons introduced him to the defendant and asked the defendant for a ticket to New York, to which the defendant informed him she did not have any tickets but would 'phone someone to see if she could get any. He did not succeed in getting a ticket nor did he see any money pass for tickets" (R., 24).

The foregoing are the three instances in the evidence, upon which the prosecution asserts the defendant was *engaged in the business* of a dealer in second-hand property.

The evidence just quoted tends to establish *three separate and distinct sales*, one on March 24, one on April 7, and one on April 28, each sale solicited by the prosecuting witnesses. All of these sales occurred in the Union Station at Washington, D. C., a public place. There was no evidence showing that the defendant solicited anyone, or had or maintained any office at the station, or that she was there for any other purpose than the use of such sta-

tion as a passenger. She, herself, lived in Newark, N. J., and was a transient in Washington. *There is no evidence showing what the defendant's occupation was, that she had no other occupation, or that she had apparatus, paraphernalia, or any of the other adjuncts commonly associated with the carrying on of a business.* The burden of proof was on the prosecution. The only reference in the evidence to the source of the tickets which it is claimed she sold, is the evidence that she said she expected to get some tickets from some friends who were arriving on the train, which affords both a reason for her presence in the depot, as well as an explanation of how she might get possession of such return tickets. This explanation, and the entire evidence in the record, is not only inconsistent with guilt, but is wholly consistent with innocence, and is, therefore, insufficient, under the rule, to establish the commission of a criminal offense.

Cravens v. U. S., 62 Fed. (2d) 261, 274 (8th Cir.);
Patterson v. U. S., 62 Fed. (2d) 968 (10th Cir.).

It is submitted that the proof offered cannot sustain a finding of engaging in business, under the rule of the foregoing cases. It is true that cases may be found where convictions have been sustained of continuing offenses such, for instance, conducting a liquor nuisance, based on a single sale of liquor, but it will be found in practically all such cases that the evidence of surrounding circumstances, the history of the defendant, the existence of a place of business, the presence of supplies, apparatus, or paraphernalia, was necessary and present in support of the evidence of specific sales. Here no such proof was offered. The defendant is a resident of Newark, New Jersey, and nothing appears in the record upon which this conviction can be based except three isolated unsolicited sales made in a public place, under circumstances, which we have heretofore suggested, are certainly as consistent with innocence as with guilt.

We, therefore, submit that the evidence is insufficient as a matter of law to sustain the conviction.

III.

Were the defendant's rights on cross examination of the prosecuting witnesses, prejudicially curtailed?

The record shows that all of the witnesses testifying with respect to sales made by the defendant were investigators in the employ of the railway companies, actively engaged in the apprehension and prosecution of persons claimed to be engaged in the sale of unused railway tickets. *Each of these witnesses, therefore, was an essentially interested witness.* On the other hand, the defendant offered an alibi as her sole defense. Her witnesses testified that during all of the times covered by the evidence, she was at home seriously ill, confined to her bed and under the care of a physician. This evidence is detailed in the record (R., 26 to 31). The contradiction in the testimony, therefore, could not have been more specific and complete.

It is obvious, that, under such circumstances, every right of the defendant with respect to the cross examination of such interested prosecuting witnesses, *should have been meticulously preserved to her.*

Yet we think it may be said conservatively, that, not only were the rights of the defendant *not* observed, but that she was practically "railroaded" to conviction in careless violation of her rights! A brief examination of the evidence will, we think, completely establish this conclusion.

The witness Baxier testified that, in company with Joseph Hector, he purchased a ticket from the defendant. The Court refused, on cross examination, to permit the defendant to inquire whether Hector was in court (R., 19); whether the witness wanted the Court to believe that the defendant, a white person, approached the witness and

asked him to buy a ticket, when there were at least three thousand people in the station in transit (R., 19); did the defendant take the money out of the witness's hands as testified on direct examination (R., 20). Strangely enough, the witness Baxier testified that, in spite of his testimony on direct examination, he actually purchased the ticket from someone other than the defendant (R., 20).

Evelyn R. Simmons, another witness, on cross examination, was excused from answering whether she came to Washington by pre-arrangement, the time when she did reach Washington on the alleged dates of purchase, and the address of the railway inspection company by whom the witness claimed to have been employed (R., 20). This witness admitted on cross examination she purchased the ticket from someone else (R., 20).

Her husband, Earl R. Simmons, on cross examination was not permitted to answer whether the defendant was pointed out to him before the purchase was made; whether he came to Washington by pre-arrangement; whether he made a purchase from anyone other than the defendant; or what time of day he arrived in Washington on the dates of purchase (R., 21).

This witness testified on direct examination that one Axline and Leaburger was present at the time of purchase (R., 23). On cross examination he was not permitted to tell whether these men were known to him, or where the witness's residence was, or whether he knew that the defendant was engaged in litigation with the Pennsylvania Railroad Company, as a result of an accident.

The witness Axline, on cross examination, was not permitted to answer whether he had made a purchase of tickets from anyone other than the defendant; or whether he had any trouble in knowing the defendant as the defendant who was representing herself upon the trial; or whether he saw the defendant before the date of purchase (R., 23).

The witness Leaburger said that no ticket was purchased on April 28th, but that the defendant stated she had no

tickets, but would phone and see if she could get any, and that he did not get a ticket, and so no money passed. On cross examination, he was not permitted to answer whether he knew defendant was about to sue the Railway Company for damages for an accident occurring on November 4, 1934; or that he knew that a settlement had been offered by a railroad company in such case, which settlement was refused by the defendant; or that he knew Mr. and Mrs. Simmons, other witnesses in the case, before meeting them on April 28th; or that the witnesses all came to Washington by pre-arrangement (R., 24).

It is interesting to note, from the record, that, when the *defendant's witness Clawans* (R., 29) testified, she was asked by the prosecuting attorney whether she had not "come down to Washington to testify *by pre-arrangement*". The defendant objected and the trial court, after having sustained objections to all of such questions when asked by the defendant, overruled the objection and directed the witness to answer!

In addition to the foregoing, defendant's witness Mueller, testified that she overhead, in the court room, the prosecuting witnesses say that they intended to "railroad" the defendant, whereupon the Court refused to allow the witness to testify further with respect to such occurrences in the court room (R., 20).

It seems perfectly obvious, that when the identity of the defendant was directly in issue, and the prosecuting witnesses were themselves interested witnesses by reason of their employment, that each of the above questions asked on cross examination was competent and relevant on either the question of the identification of the defendant or the interest of the witnesses, thus raising questions of credibility.

It is apparent that the trial court literally paid no attention to the rights of the defendant in connection with the cross examination of these witnesses.

In the case of United States v. Alford, 282 U. S. 687, is a recent statement by this Court of the rule with respect

to cross examination of interested witnesses. In the Alford case, the question asked was simply "where do you live"? The refusal of the trial court to permit an answer to such a question was made the basis by the Supreme Court for reversal of the case, notwithstanding the fact that the conviction had been affirmed in the Circuit Court of Appeals. The instances of limitation on cross examination here submitted are such that the rule there announced by this court in the Alford case, would seem peculiarly applicable.

IV.

Was the defendant given a fair trial?

Defendant was a young woman prosecuted in a district foreign to her residence. She had been in ill health (R., 7), and had previously had trouble with the judge assigned to try her case, and, as a result, filed an affidavit of prejudice, which was denied. She then asked for a bill of particulars, a request which seems reasonable in view of the general nature of the information. This was refused and she then demanded a jury trial, which was denied. Various difficulties, as shown in the bill of exceptions, arose between the court and defendant, particularly with respect to continuances and with respect to the discharge of the prosecuting witnesses. Offered testimony to show the active bias and interest of the prosecuting witnesses was refused (R., 20, 30). She was not permitted to ascertain where the prosecution witnesses came from, their employment, their residence, purpose of their trip to Washington or, in fact, any important details which might serve to attack their accuracy or credibility and, at the same time, aid her defense of alibi. Imposition of summary judgment accentuated the wrong which became, as to the acts involved irrevocable, due to the absence of any review of fact by appeal or writ of error.

For this offense, which petitioner now asserts is petty and trivial, she was required to furnish a bond of $500.00 (R., 2) and, upon her conviction, she received a "trivial" sentence in a District jail of $300.00 fine or sixty days' imprisonment, which sentence, in view of her poverty,—which the Court of Appeals recognized and allowed under a plea *in forma pauperis*,—of course, meant the suffering of such imprisonment.

Under such circumstances, we assert that it should be affirmatively found that the defendant did not receive a fair and impartial trial.

V.

The statute under which respondent was convicted provided for a fine of $300.00 or 90 days in jail. An infraction of this law undoubtedly constituted a crime against the laws of the District of Columbia.

The petitioner under Point IV, beginning on page 43 and ending on page 47, argues that Congress has properly treated a violation of this law as a "petty offense".

Respondent has searched in vain for any decision or law or other evidence that Congress has treated an infraction of this law as a "petty offense." The petitioner's statement is misleading; the only authority for any such statement is the second paragraph of Section 44 of the 1901 Code of District of Columbia, paragraph 31, Statute 1189 as amended by the Act of Congress approved March 3, 1935 (43 Statute 1119) wherein it provided in cases where the accused would not by force of the Constitution be entitled to be tried by a jury, the trial may be without a jury, but neither Congress or the Courts have in any decision under this statute said that this offense was a petty offense. The only authoritative decision on this point is the decision of the United States Court of Appeals for the District of Columbia in this case, in which there was unanimous deci-

sion holding exactly the reverse of petitioner's argument under Point IV (See opinion of Justice Groner, 84 Fed. [2nd] 265).

It cannot be reasonably said that a conviction under a statute which imposes a $300 fine or in lieu thereof 90 days' sentence in jail or upon failure to pay the fine, 90 days in jail is not a serious crime, subjecting the accused to great inconvenience, indignity and humiliation, and as well as placing a lasting stigma upon her reputation.

The petitioner's argument under this point, that this is a petty offense is quite the reverse of its argument in United States Court of Appeals for the District of Columbia when it sought to justify the arrest on Sunday, the Lord's Day, in direct contravention of Section 372 of the Code of Law of the District of Columbia. To justify this arrest on Sunday the petitioner here not only desperately but vainly attempted to show the Court that this statute prohibiting the arrest on Sunday had been repealed by implication and ought not to be in the Code, but went further to justify the arrest claiming that the offense charged was a crime and by reason thereof was not protected by the provision of Section 372 which prohibited an arrest on Sunday.

We respectfully refer to the petitioner's argument in that Court under Point I, page 3 to page 5, inclusive. The concluding words of its argument on this point are as follows:

> "There can be no question that the charge of operating a business without a license is a misdemeanor in the District of Columbia and therefore a *criminal offense*".

It also quotes in support of this argument Williamson v. U. S., 207 U. S. 425, and many other cases, as well as text writers to the effect that "All criminal cases and proceedings whatsoever" are embraced within the terms of treason, felony and *breach of peace* and therefore this

being a *criminal offense* was not protected by Section 372 of Code of Laws of District of Columbia.

VI.

Respondent concedes that she did not have a right of an appeal.

The petitioner argues under Point V of its brief that the absence of an absolute right of an appeal does not effect the right of a trial by jury and cites several cases in support of this argument on page 47 of its brief; an examination of those cases will disclose that the appellant in each case had not pursued in the manner and form the remedy provided for an appeal and therefore had not been denied "due process of law". However, the fact that a right of an appeal is not an absolute one is a potent reason why one charged with a criminal offense under a law which does not allow this right of appeal, should have a jury pass upon the fact of her guilt or innocence as provided by the Constitution of the United States (see Dimick v. Schiedt, 293 U. S., p. 486 and authorities cited). See also opinion of Justice Groner, 84 Fed. (2nd) 265.

VII.

The opinion of the lower court is in accord with the decisions of this court and the best considered cases in the highest court of the states as well as numerous decisions in the Circuit Court of Appeals.

The petitioner under Point VI argues that the opinion of the lower court is inconsistent with the decisions of this court, but it has failed to point in any one single instance where this court has decided contrary to the opinion of Mr. Justice Groner.

The petitioner has frankly admitted on page 43 of its brief that the case of Frank v. U. S. (1911, C. C. A., 6th Cir-

cuit, 192 F. 864) was the only case that it had been able to find bearing upon the subject. We have heretofore pointed out that this case had no application to the issue here for the reason that the decision in that case was on stipulation of counsel that the offense was a "petty one"; that the act under which the prosecution was had there did not provide for any *jail sentence,* and upon stipulation of counsel the trial court concurred under the authority of Callan v. Wilson, 127 U. S. 540, and Schick v. U. S., 195 U. S. 65.

There is not a decision of this court or of any Federal Court defining clearly what is or what is not a *"petty offense"*.

The last statement has been asserted by the decisions in several cases hereinbefore cited.

At the bottom of page 49, the petitioner cites several cases, to wit, Patton v. U. S., 281 U. S. 276, Callan v. Wilson, 127 U. S. 540, Dimick v. Schiedt, 293 U. S. 486, West v. Ganmon, 98 Fed. 426, to the effect that the guarantee of a trial by jury has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England, when the Constitution was adopted. This means nothing more than that the word jury when used in the Constitution means a jury of 12 men and that any less number is not within the meaning of the Constitution. This proposition is not denied and is not an issue in this case. It is conceded that for the meaning of terms or words in the Constitution we may look to the common law as a guide, but in so far as the substantive law is concerned, the Federal Courts are bound by the limitations therein and Congress has not the power to provide any other mode of trial. The logical result of petitioner's argument is that Congress could provide a trial without a jury in any case where before the adoption of the Constitution such a case had been tried either under an act of Parliament in the Colonies summarily without a jury regardless of the nature of the offense or the punish-

ment. This we deny. And assert that even if Congress were to attempt to define what was a petty offense triable by a jury, such an act would still be subject to the Constitutional limitation and to judicial review by the Courts.

CONCLUSION.

The Court of Appeals found our propositions 2, 3 and 4 "without substance" (R., 58). The lack of discussion of them by the court below makes us apprehend that the court concluded, that, since the ruling made required a new trial, the errors in question did not require measured attention. Petitioner was asked a review on the jury question alone. We assert that not only was the jury question rightly decided below, but that, in addition, each of the other three propositions which were advanced below, and which are again presented here, if considered, should require the reversal of the judgment of conviction. Thus regardless whether the decision below as to the right of jury trial, was right, the judgment of the Court of Appeals reversing the judgment of conviction in the trial court, should be affirmed, and that respondent may have such relief as she may be entitled to on the entire record.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 103—October Term, 1936.

District of Columbia, Petitioner, vs. Ethel Clawans. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 5, 1937.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent was convicted in the District of Columbia police court of engaging, without a license, in the business of a dealer in second-hand personal property, to-wit, the unused portions of railway excursion tickets, in violation of § 7, par. 39, of the Act of Congress, approved July 1, 1902, 32 Stat. 622, c. 1352, as amended by the Act of July 1, 1932, 47 Stat. 550, c. 356. On arraignment she demanded a jury trial, which was denied, and on conviction she was sentenced to pay a fine of $300 or to be confined in jail for sixty days. The case was brought to the Court of Appeals for the District of Columbia by writ of error to review the denial of the respondent's request for a jury, and other rulings of the trial court which, it was claimed, had deprived her of a fair trial. The Court of Appeals reversed the judgment, holding that a jury trial was guaranteed to petitioner by the Constitution, but that the trial had been fair in other respects. 84 F. (2d) 265. We granted certiorari, — U. S. —.

The statute under which petitioner was convicted provides that the offense may be prosecuted in the District of Columbia police court and is punishable by a fine of not more than $300 or imprisonment for not more than ninety days. The Code of the District of Columbia (1929) Tit. 18, § 165, provides that prosecutions in the police court shall be on information and that the trial shall be by jury in all cases "in which, according to the Constitution of the United States, the accused would be entitled to a jury trial," and that, "In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the

trial shall be by the court without a jury, unless in . . . cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury." Article III, § 2, Clause 3, of the Constitution, provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ." The Sixth Amendment declares that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

It is settled by the decisions of this Court, which need not now be discussed in detail, that the right of trial by jury, thus secured, does not extend to every criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as "petty", which were tried summarily without a jury, by justices of the peace in England, and by police magistrates or corresponding judicial officers in the Colonies, and punished by commitment to jail, a workhouse, or a house of correction.[1] We think, as the Court of Appeals held and respondent concedes, that, apart from the prescribed penalty, the offense of which petitioner was convicted is, by its nature, of this class, and that were it not for the severity of the punishment, the offender could not, under our decisions, claim a trial by jury as of right. *Schick* v. *United States*, 195 U. S. 65; and see *Callan* v. *Wilson*, 127 U. S. 540, 552, 555; *Natal* v. *Louisiana*, 139 U. S. 621, 624; *District of Columbia* v. *Colts*, 282 U. S. 63, 72, 73.

Engaging in the business of selling second-hand property without a license was not indictable at common law. Today it is at most but an infringement of local police regulations, and its moral quality is relatively inoffensive. But this Court has refused to foreclose consideration of the severity of the penalty as an element to be considered in determining whether a statutory offense, in other respects trivial and not a crime at common law, must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial prescribed by the Constitution. See *Schick* v. *United States, supra*, 67-68.

[1] 4 Blackstone, Commentaries, 280-281; McNamara's Paley on Summary Convictions (4th ed. 1856), 10-12; Dillon, Municipal Corporations, § 433 (5th ed. 1911, § 750). A comprehensive collection of the statutes, English and American, will be found in Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 922-965, 983-1019.

We are thus brought to the question whether the penalty, which may be imposed for the present offense, of ninety days in a common jail, is sufficient to bring it within the class of major offenses, for the trial of which a jury may be demanded. The court below thought, as we do, that the question is not free from doubt, but concluded, in view of the fact that the statute allows no appeal as of right from the conviction for the offense, and in view of its own estimate of the severity of the penalty, that three months' imprisonment is a punishment sufficiently rigorous to place respondent's delinquency in the category of major offenses.

If we look to the standard which prevailed at the time of the adoption of the Constitution, we find that confinement for a period of ninety days or more was not an unusual punishment for petty offenses, tried without a jury. Laying aside those for which the punishment was of a type no longer commonly employed, such as whipping, confinement in stocks and the like, and others, punished by commitment for an indefinite period, we know that there were petty offenses, triable summarily under English statutes, which carried possible sentences of imprisonment for periods from three to twelve months.[2] At least sixteen statutes, passed prior to the time of the American Revolution by the Colonies, or shortly after by the newly-created States, authorized the summary punishment of petty offenses by imprisonment for three months or more.[3] And at least eight others were punishable by imprisonment for six months.[4]

In the face of this history, we find it impossible to say that a ninety day penalty for a petty offense, meted out upon a trial with-

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[2] Three months: 5 Anne, c. 14, IV; 1 Geo. I, c. 48, II. Six months: 17 Geo. II, c. 5, IX. One year: 5 Eliz., c. 4, XXI; 5 Eliz., c. 15, II; 7 Jac. I, c. 4, VII; 8 Geo. I, c. 2, XXXVI; 15 Geo. II, c. 33, VI.

[3] Georgia: 18 Colonial Records (Candler) 588 (1764). Maryland: Laws 1768 (Kilty) c. 29, § 16. Massachusetts: Province Laws 1764-1765, c. 30, §§ 2, 5, 4 Acts and Resolves of Mass. Province 763. New Hampshire: Laws 1696 [8 Wm. III] c. 1, § 1. New Jersey: Paterson's Laws of New Jersey, at 410, § 3 (Act of June 10, 1799). New York: 3 Colonial Laws 318 (1743); 3 *id.* 855 (1751); 4 *id.* 304 (1758); 4 *id.* 349 (1759); 4 *id.* 748 (1763); 4 *id.* 925 (1766). North Carolina: Laws 1778, c. 2, 24 State Records 158. Pennsylvania: 7 Statutes at Large of Pennsylvania from 1682 to 1801, c. 534, § 12 (1766); 8 *id.*, c. 623, § 2 (1771). Virginia: 29 Geo. II, c. 4, § 4 (1756); Laws 1787, c. 48, § 13. See also Connecticut, 1786 Stat. 36 (four months).

[4] Maryland: Laws 1715 (Kilty) c. 44, § 34. Massachusetts: Province Laws 1752-1753, c. 16, § 1, 3 Acts and Resolves of Mass. Province 645. New Hampshire: 3 Laws of New Hampshire (Metcalf) 72 (1754); 4 *id.* 75 (1777). New Jersey: 27 & 28 Geo. II, c. 261, § 11, Acts of Province of New Jersey (Allinson) 198, 201 (1754). New York: 3 Colonial Laws 1096 (1755); Laws 1785, c. 40, § 3; Laws 1785, c. 47, § 2.

out a jury, does not conform to standards which prevailed when the Constitution was adopted, or was not then contemplated as appropriate notwithstanding the constitutional guarantee of a jury trial. This conclusion is unaffected by the fact that respondent is not entitled to an appeal as of right. Code of the District of Columbia (1929) Tit. 18, § 28. The safeguards of an appeal are different in nature and purpose from those of a jury trial. At common law there was no review of criminal cases as of right. Due process does not comprehend the right of appeal, *McKane* v. *Durston*, 153 U. S. 684, 687. The early statutes providing for summary trial often did not allow it. And in any case it cannot be assumed that the authority to allow an appeal, given to the justices of the Court of Appeals by the District laws, will not be exercised in a proper case.

We are aware that those standards of action and of policy which find expression in the common and statute law may vary from generation to generation. Such change has led to the abandonment of the lash and the stocks, and we may assume, for present purposes, that commonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribes, in some cases which were triable without a jury when the Constitution was adopted. See *Schick* v. *United States*, *supra*, 67, 68; compare *Weems* v. *United States*, 217 U. S. 349, 373; *District of Columbia* v. *Colts*, *supra*, 74; *Powell* v. *Alabama*, 287 U. S. 45, 71-73; *United States* v. *Wood*, 299 U. S. 123, 141 *et seq.* But we may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes,[8] is admissible, without concluding that ninety days is too much. Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments.

Congress itself, by measuring the punishment in this case in conformity to the commonly accepted standard when the Constitution was adopted, and declaring that it should be applied today unless found to transgress constitutional limitations, has expressed its deliberate judgment that the punishment is not too great to be sum-

[8] See footnote 2, *supra.*

marily administered. A number of states have continued in force statutes providing for trial, without a jury, of violations of municipal ordinances, and sundry petty statutory offenses, punishable by commitment for three months or more.[6] Convictions under such legislation have been upheld many times in the state courts, despite objections to the denial of a jury trial.[7] In England many acts of Parliament now in force, authorizing ninety day punishments, call for summary trials.[8]

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[6] (A) Statutes embracing violations of municipal ordinances generally. E. g.: Ariz. Rev. Code (Struckmeyer, 1928) §§ 382, 442, (three months); Neb. Comp. Stat. (1929) §§ 18-201, 18-205, (three months); New Mex. Stats. (Courtright, 1929) §§ 90-402 (66), 90-901, 90-910, 79-322, (three months); Nev. Comp. Laws (Hillyer, 1929) §§ 1128 (1), 1167, (six months); Wyo. Rev. Stat. (Courtright, 1931) §§ 22-402, 22-409, (three months).

(B) Statutes commanding summary trial for specified offenses. E. g.: N. J. Comp. Laws (1924 Supp.), §§ 135-63 (3), 135-76 (operating motor vehicle under influence of liquor; six months; see Klinges v. Court of Common Pleas, 130 Atl. 601); N. J. Comp. Laws (1910) § 59-42; (1930 Supp.) § 160-22 (disorderly persons act; three months); Pa. Stat. Ann. (Purdon, 1931), § 18-2033 (vagrancy; six months); § 18-2832 (frequenting of public places by thieves, for unlawful purpose; three months).

The most extensive elimination of the jury prevails in New York. The three-judge Court of Special Sessions, sitting without a jury, has jurisdiction to try all misdemeanors [i. e., offenses punishable with one year's imprisonment, N. Y. Penal Law (1909), § 1937] committed in New York City. Inferior Criminal Courts Act of the City of New York, N. Y. Laws 1910, c. 659, § 31 (1), (4). A city magistrate sitting alone may try certain misdemeanors, including violations of N. Y. Penal Law (1909), § 1566, proscribing the sale of street railroad transfer tickets, Inferior Criminal Courts Act, § 43 (d), added by Laws 1915, c. 531. Other legislation, state-wide in application, provides for summary trial and conviction of persons guilty of disorderly conduct (six months), N. Y. Penal Law (1923), §§ 723, 724; of persons frequenting a public place for purposes of crime (100 days), N. Y. Code Crim. Proc., § 898-a; of "vagrants" (one year in jail; three years in correctional institution), N. Y. Code Crim. Proc., §§ 891, 891-a.

[7] In Wilmarth v. King, 74 N. H. 512 (1908), the court approved a statute authorizing six months' imprisonment as not exceeding in magnitude the pre-Revolutionary punishments. In the following cases convictions under statutes authorizing commitment for three months or more were upheld and the right to jury trial held properly denied. Bray v. State, 140 Ala. 172 (1903); State v. Parker, 87 Fla. 181 (1924); State v. Glenn, 54 Md. 572 (1880); State v. Broms, 139 Minn. 402 (1918); State v. Anderson, 165 Minn. 150 (1925); Bell v. State, 104 Neb. 203 (1920); State v. Kacin, 123 Neb. 64 (1932); People ex rel. St. Clair v. Davis, 143 App. Div. 579 (1911); People v. Harding, 115 Misc. 298 (1921); Byers v. Commonwealth, 42 Pa. St. 89 (1862).

[8] Thirty-seven offenses are listed in Stone's Justices' Manual (66th ed. 1934), Appendix of Table of Punishments for Offences Cognizable Under the Summary Jurisdiction, pp. 1904-1945. E. g. Frauds by Workmen Act, 1777, 17 Geo. III, c. 56, § 1; Merchandise Marks Act, 1887, 50 & 51 Vict., c. 28, § 2; Agricultural Marketing Act, 1933, 23 & 24 Geo. V, c. 31, § 6 (5).

Several of the statutes specify larger penalties, but by § 17 of the Summary Judicature Act, 1879, 42-43 Vict., c. 49, except in cases of assault, sentences exceeding three months cannot be administered unless the accused has been offered the choice of trial by jury.

This record of statute and judicial decision is persuasive that there has been no such change in the generally accepted standards of punishment as would overcome the presumption that a summary punishment of ninety days' imprisonment, permissible when the Constitution was adopted, is permissible now. Respondent points to no contrary evidence. We cannot say that this penalty, when attached to the offense of selling second-hand goods without a license, gives it the character of a common law crime or of a major offense, or that it so offends the public sense of propriety and fairness as to bring it within the sweep of a constitutional protection which it did not previously enjoy.

Although we conclude that respondent's demand for a jury trial was rightly denied, there must be a new trial because of the prejudicial restriction, by the trial judge, of cross-examination by respondent. The testimony of five prosecution witnesses was the sole evidence of the acts of respondent relied on to establish the doing of business without a license. These acts were the sale by her, on each of three occasions, to one or another of the witnesses, of the unused portion of a round trip railway passenger ticket from New York to Washington. Three of the five, a man and his wife and another, were employed by the Railroad Inspection Company as investigators. The other two were company police of the Baltimore & Ohio Railroad. All were private police or detectives, apparently acting in the course of their private employment. Common experience teaches us that the testimony of such witnesses, especially when uncorroborated, is open to the suspicion of bias, see *Gassenheimer* v. *United States*, 26 App. D. C. 432, 446; *Moller* v. *Moller*, 115 N. Y. 466, 468; *People* v. *Loris*, 131 App. Div. 127, 130; *Sopwith* v. *Sopwith*, 4 Sw. & Tr. 243, 246-7; Wigmore, Evidence (2d ed. 1923) §§ 949, 969, 2062, and that their cross-examination should not be curtailed summarily, see *State* v. *Diedtman*, 58 Mont. 13, 24, especially when it has a direct bearing on the substantial issues of the case.

The defense was a suggested mistaken identity of respondent and an alibi, that at the times mentioned she was confined to her bed by illness, at her home in Newark, New Jersey. A number of questions on cross-examination by respondent were aimed at showing mistaken identity and at testing credibility. She asked one witness whether respondent had been pointed out to him. She asked another whether he had any trouble in "knowing" the re-

spondent at the trial, and whether he had seen her before the date of the alleged sale of tickets to which he testified. All these questions were excluded, as were others which were proper, since they might have established contradiction in the testimony of the witnesses for the prosecution.

Other questions, which were relevant to the issue and obviously proper tests of credibility, were excluded. The woman witness had testified that one of the sales took place in the presence of her husband, and of the two railroad police witnesses. On cross-examination she could not remember whether anyone beside her husband was present. Yet respondent was not permitted to ask the husband whether the railroad police witnesses were known to him or to ask one of the latter whether he knew the husband and wife before the date of the alleged sale. The court instructed one of the police officers not to answer the question whether the husband had come to Washington by prearrangement. Like questions addressed to the husband and his wife were excluded. The respondent was similarly prevented from making inquiries as to corroborative detail, such as the time of day when the witnesses arrived in Washington on the dates of the alleged sales, and the place of residence of a witness, see *Alford* v. *United States,* 282 U. S. 687. In the circumstances of the case, these questions may have had an important bearing on the accuracy and truthfulness of the testimony of the prosecuting witnesses. We do not stop to give other examples of the summary curtailment of all inquiry as to matters which are the appropriate subject of cross-examination.

The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, and of slight bearing on the bias and credibility of the witnesses, are not reversible errors. But the prevention, throughout the trial of a criminal case, of all inquiry in fields where cross-examination is appropriate, and particularly in circumstances where the excluded questions have a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, passes the proper limits of discretion and is prejudicial error. See *Alford* v. *United States, supra.*

The judgment of the Court of Appeals will be affirmed, that of the police court reversed, and the case will be remanded with instructions for a new trial without a jury.

Affirmed.

p. 2 + dissent

SUPREME COURT OF THE UNITED STATES.

No. 103.—October Term, 1936.

District of Columbia, Petitioner, vs. Ethel Clawans. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 5, 1937.]

Separate opinion of Mr. Justice McReynolds and Mr. Justice Butler.

Mr. Justice Butler and I approve the conclusion of the Court of Appeals concerning respondent's right to trial by jury; also we accept the supporting opinion announced there as entirely adequate.

The Sixth Amendment—In all criminal prosecutions, the accused shall enjoy the right to a speedy, and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Seventh Amendment—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

We cannot agree that when a citizen is put on trial for an offense punishable by 90 days in jail or a fine of $300.00, the prosecution is not criminal within the Sixth Amendment. In a suit at common law to recover above $20.00, a jury trial is assured. And to us, it seems improbable that while providing for this protection in such a trifling matter the framers of the Constitution intended that it might be denied where imprisonment for a considerable time or liability for fifteen times $20.00 confronts the accused.

In view of the opinion just announced, it seems permissible to inquire what will become of the other solemn declarations of the Amendment. Constitutional guarantees ought not to be subordinated to convenience, nor denied upon questionable precedents or uncertain reasoning. See *Boyd* v. *United States*, 116 U. S. 616, 635; *In re Debs, et al.*, 158 U. S. 564, 594.

We concur in the conclusion of the Court concerning unfairness of the trial and the necessity for a new one.

This cause shows the grave danger to liberty when ~~offenders~~ one accused must submit to the uncertain judgment of a single magistrate.